

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

ACQIS, LLC

)

DOCKET NO. 6:09cv148

-vs-

)

Tyler, Texas

APPRO INTERNATIONAL,
ET AL

)

9:00 a.m.

February 23, 2011

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE LEONARD DAVIS,
UNITED STATES DISTRICT JUDGE
and

THE HONORABLE JOHN D. LOVE,
UNITED STATES MAGISTRATE JUDGE

A P P E A R A N C E S

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MS. JUDY WERLINGER
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1 P R O C E E D I N G S

2 (Jury out.)

3 COURT SECURITY OFFICER: All rise.

4 THE COURT: Bring the jury in.

5 (Jury in.)

6 THE COURT: Please be seated.

7 All right. Good morning, Ladies and
8 Gentlemen of the Jury. Welcome back. Y'all all look
9 refreshed and bright-eyed; have your notebooks and ready
10 to get to work.

11 So we're nearing the end of this case.
12 I'm going to give you some instructions just so you'll
13 know what's going on this morning. This will probably
14 take 30 minutes, maybe a little longer. Then I'm going
15 to give you a short break, probably five or ten minutes
16 just to stretch your legs and use the facilities.

17 Then you will come back and hear the
18 closing arguments. Each side has one hour, so it will
19 be about a two-hour sit to hear the closing arguments.
20 Plaintiff will go first and then Defendant, and then
21 Plaintiff will have a short time for rebuttal evidence.

22 We may have to take like a minute break
23 in between. We're having a little trouble with the
24 electronics, so when they go to change sides, we may
25 need to do that.

1 But if you would now, listen to my
2 instructions. Please remember you're going to have a
3 copy of these to take with you to the jury room. So you
4 are welcome to take notes, but realize you will have a
5 copy.

6 Members of the Jury: You have now heard
7 the evidence in this case. I will now instruct you on
8 the law that you must apply. It is your duty to follow
9 the law as I give it to you. On the other hand, you,
10 the jury, are the sole judges of the facts.

11 Do not consider any statement that I may
12 have made during the trial or make in these instructions
13 as any indication that I have any opinion about the
14 facts of this case. Again, that is your sole province.

15 And you and your collective wisdom will
16 decide those facts.

17 After I instruct you on the law, the
18 attorneys will have an opportunity to make their closing
19 arguments. Again, the statements and arguments of the
20 attorneys are not evidence and are not instructions on
21 the law. They are intended only to assist you in
22 understanding the evidence and the parties' contentions.

23 Answer each question from the facts as
24 you find them. Do not decide who you think should win
25 and then answer the questions accordingly. Your answers

1 and your verdict must be unanimous.

2 In determining whether any fact has been
3 proved in this case, you may, unless otherwise
4 instructed, consider the testimony of all witnesses,
5 regardless of who may have called them, and all exhibits
6 received in evidence, regardless of who may have
7 produced them.

8 Now, with regard to witnesses' testimony,
9 again, you, the jurors, are the sole judges of the
10 credibility of all witnesses and the weight and effect
11 of all evidence. By the Court allowing testimony or
12 other evidence to be introduced over the objection of an
13 attorney, the Court did not indicate any opinion as to
14 the weight or effect of such evidence. Again, that is
15 your sole province.

16 When the Court sustained an objection to
17 a question addressed to a witness, you must disregard
18 the question entirely and may draw no inference from the
19 wording of it or speculate as to what the witness would
20 have testified to, if he or she had been permitted to
21 answer the question.

22 Again, you're only to consider and base
23 your case (sic) on the legally admissible evidence that
24 is admitted in this case.

25 At times during the trial, it was

1 necessary for the Court to talk with the lawyers here at
2 the bench out of your hearing or by calling a recess.

3 We met because often, during the trial,
4 something comes up that does not involve the jury. You
5 should not speculate on what was discussed during such
6 times.

7 In determining the weight to be given the
8 testimony of a witness, you should ask yourself whether
9 there was evidence tending to prove that the witness
10 testified truthfully or falsely and whether --
11 whether -- if you think that they testified falsely, you
12 need to consider whether that was with regard to some
13 important fact or whether there was evidence that at
14 some other time the witness said or did -- let me start
15 over. That's not making sense.

16 In determining the weight to give to the
17 testimony of a witness, you should ask yourself whether
18 there was evidence tending to prove that the witness
19 testified falsely concerning some important fact or
20 whether there was evidence that at some other time the
21 witness said or did something or failed to say or do
22 something that was different from the testimony the
23 witness gave before you during the trial.

24 You should keep in mind, of course, that
25 a simple mistake by a witness does not necessarily mean

1 that the witness was not telling the truth as he or she
2 remembers it, because people sometimes forget some
3 things or remember other things inaccurately.

4 So if a witness has made a misstatement,
5 you need to consider whether that misstatement was an
6 intentional falsehood or simply an innocent lapse of
7 memory, and the significance of that may depend on
8 whether it has to do with an important fact in the case
9 or only with an unimportant detail.

10 Now, with regard to examining the
11 evidence. Certain testimony in this case has been
12 presented to you through a deposition. As I told you
13 earlier, a deposition is sworn, recorded answers to
14 questions asked of a witness in advance of trial. Under
15 some circumstances, if a witness cannot be present to
16 testify from the witness stand, the witness' testimony
17 may be presented under oath in the form of a deposition.

18 Sometimes before the trial, the attorneys
19 representing the parties in this case question this
20 witness under oath. This deposition testimony is
21 entitled to the same consideration and is to be judged
22 by you as to credibility and weight and otherwise
23 considered by you, insofar as possible, the same as if
24 the witness had been present and had testified from the
25 witness stand in court.

1 While you should consider only the
2 evidence in this case, you are permitted to draw such
3 reasonable inferences from the testimony and exhibits as
4 you feel are justified in light of common experience.

5 In other words, you may make deductions
6 and reach conclusions that reason and common sense lead
7 you to make -- lead you to draw from the facts that have
8 been established by the testimony and evidence in the
9 case.

10 Unless you are instructed otherwise, the
11 testimony of a single witness may be sufficient to prove
12 any fact, even if a greater number of witnesses may have
13 testified to the contrary, if, after considering all the
14 other evidence, you choose to believe that single
15 witness. Again, you're the sole judges of the witnesses
16 and their credibility.

17 There are two types of evidence that you
18 may consider in properly finding the truth as to the
19 facts in this case.

20 The first is direct evidence, such as the
21 testimony of an eyewitness.

22 The other is indirect or circumstantial
23 evidence; that is, the proof of a chain of circumstances
24 that indicates the existence or nonexistence of certain
25 other facts.

1 As a general rule, the law makes no
2 distinction between direct and circumstantial evidence,
3 but simply requires that you find the facts from a
4 preponderance of all of the evidence, both direct and
5 circumstantial.

6 Now, with regard to expert witnesses.
7 You've heard several testify in this case. When the
8 knowledge of a technical expert -- when the knowledge of
9 a technical subject may be helpful to the jury, a person
10 who has special training or experience in that technical
11 field is called an expert witness and is permitted to
12 state his or her opinion on those technical matters.

13 However, you are not required to accept
14 that opinion. As with any other witness, it is up to
15 you to decide whether to rely upon it or not. In
16 deciding whether to accept or rely upon the opinion of
17 an expert witness, you may consider any bias of the
18 witness, including any bias you may infer from evidence
19 that the expert witness has been or will be paid for
20 reviewing the case and testifying, or from evidence that
21 he or she testifies on a regular basis as an expert
22 witness; and that income from such testimony represents
23 a significant portion of the expert's income.

24 Now, with regard to the contentions of
25 the parties. Let me go over those with you again,

1 although I know you're familiar with them.

2 ACQIS contends that IBM makes, uses,
3 offers to sell, sells, or imports products that infringe
4 at least one of Claims 12 and 74 of the '415 patent,
5 Claim 56 of the '416 patent, and Claims 16, 26, and 57
6 of the '779 patent.

7 IBM denies that it has infringed any
8 claims of the patents-in-suit, whether directly or
9 indirectly, by inducing infringement of any of the
10 asserted claims.

11 IBM also denies that ACQIS is entitled to
12 any damage award.

13 IBM, on the other hand, contends that the
14 claims of the '415 patent, the '416 patent, and the '779
15 patent are invalid. Invalidity is a defense to
16 infringement. Therefore, even though the PTO Examiner
17 has allowed the asserted claims, you, the jury, must
18 decide whether the asserted claims are invalid.

19 Your job is to decide -- is to decide
20 whether the asserted claims have been infringed and
21 whether any of the asserted claims are invalid. If you
22 decide that any claim of the patent has been infringed
23 and is not invalid, then you will need to decide any
24 money damages to be awarded to ACQIS as compensation for
25 the infringement.

1 At this time, I'd like to ask my -- the
2 Court Security Officer to pass out to you the verdict
3 form that you will be receiving in this case. And I
4 want to take a moment and go over that with you to sort
5 of give you an overview.

6 These are the questions you're going to
7 be answering in your verdict, and I think by going over
8 the verdict form, it will give you sort of an overview
9 to the remainder -- remainder of my instructions.

10 You will see on the first page is the
11 name of the case, verdict form, and then it says: In
12 answering these questions, you are to follow all of the
13 instructions I have given you in the Court's Charge.

14 Question No. 1: Did ACQIS prove, by a
15 preponderance of the evidence -- and that's that
16 standard of proof that I will visit with you about in a
17 minute -- did ACQIS prove, by a preponderance of the
18 evidence, that IBM infringed any of the asserted claims
19 of the ACQIS patents identified below.

20 Then you'll see each of the patents
21 listed and for each patent the claims that are asserted,
22 and you will answer yes or no for each listed claim.
23 That's infringement.

24 Now, if you'll turn to the next page, is
25 the issue dealing with the invalidity. And this -- you

1 are first instructed for each listed claim, you answer
2 yes to in Question 1 -- in other words, if you found,
3 yes, there was infringement, then you will answer as to
4 that claim, but only those claims that you answer yes to
5 in the first question.

6 If you answered no to any of the claims
7 in Question 1, then you don't answer that portion of
8 Question 2. Everybody understand that?

9 Okay. And the question in Question 2 is:
10 Did IBM prove, by clear and convincing evidence --
11 there's that standard of proof -- that such claim of the
12 patents-in-suit is invalid? Then answer yes or no for
13 each invalidity theory.

14 And as you'll recall, there were two:
15 Invalidity by anticipation or invalidity by obviousness.
16 So you see each of the three patents listed, each of the
17 claims relating to that patent, and then you will answer
18 whether IBM proved by clear and convincing evidence as
19 to, say, Claim 12, that it was invalid by anticipation.
20 You will answer yes or no.

21 Then as to obviousness, you will answer
22 yes or no, and you'll do that for each of those claims
23 listed.

24 All right. Then after you have answered
25 that question, what sum of money -- the next question,

1 No. 3, is the damage question. What sum of money, if
2 paid now in cash, do you find from a preponderance of
3 the evidence -- that evidence standard -- would fairly
4 and reasonably compensate ACQIS for IBM's patent
5 infringement.

6 Only award damages for those claims you
7 find infringed by IBM and not proven invalid by IBM. In
8 other words, you would be answering only to those claims
9 that you find -- answered both yes to infringement and
10 no as to invalidity, both anticipation and obviousness,
11 okay?

12 Only award damages for those claims you
13 find infringed by IBM and not proven invalid by IBM. In
14 other words, do not award damages for claims that you
15 did not find infringed by IBM or those claims where IBM
16 proved the claim invalid.

17 Everybody follow that?

18 Okay. Then the place for your answer,
19 signed this blank day of February 2011. Date it; your
20 jury foreperson will sign the verdict form.

21 So that's an overview of the questions.

22 Now let me visit with you about burdens
23 of proof. As I told you in any legal action, facts must
24 be proved by a required amount of evidence known as the
25 burden of proof or standard of proof.

1 In a patent case such as this, there are
2 two different burdens of proof that are used. The first
3 is the preponderance of the evidence standard, and the
4 second is the clear and convincing evidence standard.

5 The preponderance of the evidence
6 standard means that the evidence persuades you that a
7 claim is more likely true than not true.

8 The clear and convincing evidence
9 standard means that the evidence produces in your mind a
10 firm belief or conviction as to the matter at issue.

11 The clear and convincing evidence
12 standard requires greater proof than is necessary for
13 the preponderance of the evidence standard.

14 ACQIS has the burden of proving
15 infringement by a preponderance of the evidence, as you
16 noted in Question 1. In determining whether any fact
17 has been proved by a preponderance of the evidence, you
18 may, unless otherwise instructed, consider the
19 stipulations, the testimony of all witnesses, regardless
20 of who may have called them, and all exhibits received
21 into evidence, regardless of who may have produced them.

22 If the proof establishes that all
23 essential parts of ACQIS' infringement claim is more
24 likely true than not true, then you should find for
25 ACQIS as to that claim.

1 As issued, United States patent --
2 patents that are issued by the United States Patent &
3 Trademark Office, as ACQIS' patents were, they are
4 presumed to be valid.

5 IBM has the burden of overcoming that
6 presumption and proving invalidity of the ACQIS patent
7 claims by clear and convincing evidence. There's that
8 other evidence standard that you saw in Question 2.

9 In determining whether any fact has been
10 proved by clear and convincing evidence, you may, unless
11 otherwise instructed, again consider the stipulations,
12 the testimony of all witnesses, regardless who have may
13 have called them, and all exhibits received into
14 evidence, regardless of who may have produced them.

15 Evidence of prior art which was not
16 reviewed by the PTO may be more probative of meeting
17 this standard than prior art which was reviewed by the
18 PTO.

19 The clear and convincing evidence
20 standard requires a greater degree of proof than is
21 necessary for the preponderance of the evidence
22 standard. The proof must establish a firm belief or
23 conviction in your mind that the invalidity claims are
24 correct for you to find that ACQIS' patents are invalid.

25 Now, turning to the claims, the patent

1 claims. At the beginning of the trial, I gave you some
2 general information about patents and the patent system
3 and a brief overview of the patent laws relevant to this
4 case. I will now give you more detailed instructions
5 about the patent laws that specifically relate to this
6 case.

7 If you would like to review my
8 instructions at any time during your deliberations, they
9 will be available to you in the jury room.

10 The claims of a patent are the numbered
11 sentences at the end of the patent. The claims describe
12 the claimed inventions and define what the patent owner
13 may prevent others from doing. Claims may describe
14 products, such as machines or chemical compounds, or
15 methods for performing the function. Each of the claims
16 must be considered individually.

17 Claims are usually divided into parts or
18 steps called limitations or claim elements. For
19 example, a claim that covers the invention of a table
20 may recite the table top, four legs, and the glue that
21 secures the legs to the table top. In this example, the
22 table top, legs, and glue are each a separate element or
23 limitation of the claim.

24 Now, with regard to construction of the
25 claims. In deciding whether or not an accused method or

1 product infringes the patent, the first step is to
2 understand the meaning of the words used in the patent
3 claims. It is my job as Judge to determine what the
4 patent claims mean and to instruct you about that
5 meaning.

6 You must accept the meanings I give you
7 and use those meanings when you decide whether or not
8 the patent claims are infringed and whether or not they
9 are invalid.

10 I have interpreted the meaning of some of
11 the language in the patent claims involved in this case.

12 My interpretation of those claim terms
13 appears in Appendix A to this charge. You will have
14 those attached, and it's a chart, and there's about six
15 different terms that have been interpreted by the Court.

16 The claim language I have not interpreted
17 for you in Appendix A is to be -- to be given its
18 ordinary and a custom meaning as understood by one of
19 ordinary skill in the art. So if I didn't define a
20 word, then you are to give it its ordinary and customary
21 meaning as understood by one of ordinary skill in the
22 art. And you've heard testimony about that from various
23 witnesses.

24 Now, open-ended or comprising claims.
25 The beginning or preamble of certain claims use the word

1 comprising. Comprising means including containing but
2 not limited to. That is, if you decide that IBM's
3 products include all of the requirements of the claim,
4 then the claim is infringed. This is true even if the
5 accused products include components in addition to those
6 requirements set forth in the claim.

7 For example, a claim to a table
8 comprising a table top, legs, and glue would be
9 infringed by a table that includes a table top, legs,
10 and glue, even if that table also includes wheels on the
11 table legs.

12 Now, with regard to independent and
13 dependent claims. So far, my instructions on
14 infringement have applied to what are known as
15 independent claims. The patents also contain dependent
16 claims. Each dependent claim refers to an independent
17 claim.

18 A dependent claim includes each of the
19 requirements of the independent claim to which it refers
20 and one or more additional requirements as set forth in
21 the dependent claim. Therefore, to determine what a
22 dependent claim covers, it is necessary to look both at
23 the dependent claim and the other claim or claims to
24 which it refers.

25 Asserted Claims 12 and 74 of the '415

1 patent and Claim 57 of the '779 patent are dependent
2 claims. In order to find infringement of Dependent
3 Claims 12 and 74 of the '415 patent, you must first
4 determine whether Independent Claims 11 and 73,
5 respectively, of the '415 patent are infringed.

6 In order to find infringement of
7 Dependent Claim 57 of the '779 patent, you must first
8 determine whether Independent Claim 56 of the '779
9 patent is infringed. If you decide that the independent
10 claim has not been infringed, then the dependent claim
11 cannot have been infringed.

12 If you decide that the independent claim
13 has been infringed, you must then separately determine
14 whether each additional requirement of the dependent
15 claim has also been included in the accused products and
16 thus infringes.

17 If each additional requirement has been
18 included, then the dependent claim has been infringed.
19 ACQIS must prove by a preponderance of the evidence that
20 a patent claim has been infringed. Again, that's the
21 burden of proof.

22 Now, with regard to infringement. The
23 first type of infringement I want to discuss with you is
24 direct infringement. I will instruct you on the rules
25 you must follow to determine whether ACQIS has proven

1 that IBM has infringed one or more claims of the patents
2 involved in this case.

3 You must decide whether IBM has made,
4 used, sold, or offered for sale within the United States
5 or imported into the United States products covered by
6 the asserted claims. You must compare each claim to
7 each IBM product that ACQIS accuses of infringement to
8 determine whether every requirement of the claim is
9 included in the accused products.

10 To prove literal infringement, ACQIS must
11 prove by a preponderance of the evidence -- there's that
12 standard again -- that IBM's products include every
13 requirement in ACQIS' patent claims. If a product omits
14 any requirement recited in ACQIS' patent claim, then
15 that product does not infringe that claim.

16 For literal infringement, ACQIS is not
17 required to prove that IBM intended to infringe or even
18 knew of the patent; just that all of the elements of the
19 claim are met in the product. Now that's direct
20 infringement.

21 Next is what is known as indirect
22 infringement. ACQIS also alleges that IBM indirectly
23 infringed the patents-in-suit by inducing infringement
24 by another. The act of encouraging or inducing others
25 to infringe a patent is called inducing infringement.

1 A party includes -- a party includes
2 patent infringement -- oh, excuse me -- a part -- a
3 party induces patent infringement, if it is
4 purposefully -- I better put these back on.

5 A party induces patent infringement if it
6 purposefully causes, urges, or encourages another to
7 infringe the claims of a patent.

8 Inducing infringement cannot occur
9 unintentionally. This is different from direct
10 infringement, which can occur unintentionally. To prove
11 IBM induced patent infringement, ACQIS must prove by a
12 preponderance of the evidence that:

13 (1) IBM actively encouraged or instructed
14 another person on how to use a product in a way that
15 infringes at least one patent claim;

16 (2) that IBM knew of the patent at that
17 time;

18 And (3) that IBM knew or should have
19 known that the encouragement or instructions would
20 result in infringement of at least one patent claim;

21 And (4) the other person infringed at
22 least that one patent claim.

23 ACQIS must prove that IBM had a specific
24 intent to induce infringement. ACQIS must prove that
25 IBM knowingly induced infringement, not merely that IBM

1 knowingly induced the acts that constitute infringement.

2 Finally, ACQIS must prove that there is
3 direct infringement for each instance of indirect
4 infringement.

5 And, again, on -- as on direct
6 infringement, ACQIS' burden there is by a preponderance
7 of the evidence.

8 Now, with regard to invalidity. Patent
9 invalidity is a defense to patent infringement, and IBM
10 contends that the asserted claims of ACQIS'
11 patents-in-suit are invalid.

12 An issued patent is accorded a
13 presumption of validity based on the presumption that
14 the United States Patent & Trademark Office acted
15 correctly when it issued the patent. Even though the
16 Patent Office Examiner has allowed the claims of a
17 patent, however, you have the ultimate responsibility
18 for deciding whether the claims of the patent are valid.

19 I will now instruct you on the invalidity
20 issues you should consider. As you consider these
21 issues, remember that IBM bears the burden of proving,
22 with clear and convincing evidence, that the claims are
23 invalid.

24 The first is anticipation, which you will
25 notice the question that you will be answering in

1 Question 2, Column 1.

2 IBM contends that the asserted claims are
3 invalid, because the claimed invention is not new, based
4 on the Ketris reference prior art. You will recall the
5 Ketris reference that was referred to by the witnesses.

6 For a claim to be invalid based -- or for
7 a claim to be invalid because it is not new, all of its
8 requirements must have existed in a single device or
9 method that predates the claimed invention or must have
10 been described in a single previous publication or
11 patent that predates the claimed invention.

12 In patent law, such previous device,
13 method, publication, or patent is called a prior art
14 reference. If a patent claim is not new, then we say
15 that it is anticipated by a prior art reference.

16 IBM must prove with clear and convincing
17 evidence that the claim was anticipated. The disclosure
18 in the prior art reference does not have to be in the
19 same words as the claim; but all of the requirements of
20 the claim must be there, either stated or necessarily
21 implied, so that someone of ordinary skill in the art,
22 looking at that one reference, would be able to make and
23 use at least one embodiment of the claimed invention.

24 Anticipation also occurs when the claimed
25 invention inherently, necessarily results from practice

1 of what is disclosed in the written reference, even if
2 the inherent disclosure was unrecognized or
3 unappreciated by one of ordinary skill in the field of
4 the invention.

5 Here is a list of the ways that IBM can
6 show that a patent claim was not new.

7 Here is a list of the ways that IBM can
8 show that a patent claim was not new:

9 If the claimed invention was already
10 publicly known or publicly used by others in the United
11 States before May 12, 2000 -- that's the critical date
12 that you've heard referred to;

13 If the claimed invention was already
14 patented or described in a printed publication anywhere
15 in the world before May 12th, 2000;

16 If the claimed invention was already
17 described in another published U.S. Patent application
18 or issued U.S. patent that was based on a patent
19 application filed before May 12th, 2000;

20 If a patent claim is not new, as
21 explained above, then you must find it is invalid based
22 on anticipation.

23 Another way of finding anticipation is if
24 it's made or invented by someone else.

25 IBM con -- also contends that each of the

1 asserted claims of the patents-in-suit are invalid as
2 anticipated, because the invention was first made or
3 invented by someone else, specifically the Ketris prior
4 art.

5 If someone other than Dr. Chu made or
6 invented the invention described in one or more of such
7 patent claims involved in this lawsuit, then each such
8 claim was anticipated by the other invention and each
9 such claim is invalid.

10 Again, IBM must prove by clear and
11 convincing evidence that each such claim was anticipated
12 by the other invention.

13 Here is a list of the ways that IBM can
14 show that a patent claim was not new, because the
15 invention described in the -- such claim was first made
16 or invented by someone else.

17 First, if the claimed invention was
18 already made by someone else in the United States before
19 the date of Dr. Chu's invention, if that other person
20 had not abandoned -- abandoned the invention or kept its
21 secret;

22 Next, if ACQIS and IBM dispute who is a
23 first inventor, the person who first conceived of the
24 claimed invention and first reduced it to practice is
25 the first inventor;

1 If one person conceived of the claimed
2 invention first but reduced it to practice second, that
3 person is the first inventor, only if that person,

4 (a) began to reduce the claimed invention
5 to practice before the other party conceived of it;

6 And (b) continued to work with reasonable
7 diligence to reduce to it practice from a time just
8 before the other party's conception.

9 In order to prove prior invention in this
10 case, IBM is required to present additional evidence
11 beyond the testimony of the prior inventor. However,
12 you must evaluate all pertinent evidence, including that
13 testimony, and make a sound determination that the
14 evidence credibly establishes the prior invention.

15 Ultimately, IBM bears the burden of
16 proving with clear and convincing evidence that the
17 patent claims are invalid. If the invention of a patent
18 claim was first made or invented by someone else, as
19 explained above, you must find that the patent claim is
20 invalid.

21 The next way in which the defense of
22 anticipation can be found is what's called statutory
23 bar.

24 IBM may prove that the asserted claims of
25 the patents-in-suit are invalid by showing by clear and

1 convincing evidence that each such claim failed to meet
2 one of several statutory provisions in the patent laws.
3 These provisions are called statutory bars.

4 For a patent claim to be invalid because
5 of a -- of a statutory bar, all the requirements must
6 have been present in the Ketris prior art reference
7 dated more than one year before the effective filing
8 date of the patent application.

9 Here is a list of the ways that IBM can
10 show that the patent application was not timely filed,
11 that is, filed within one year of the occurrence of any
12 of the following events:

13 If the claimed invention was already
14 patented or described in a printed publication anywhere
15 in the world before the effective filing date of the
16 patent application.

17 A reference is a printed publication if
18 it is reasonably accessible to those interested in the
19 field, even if it is difficult to find.

20 An electronic publication, including
21 online or internet publication, is a printed publication
22 if it is at least reasonably accessible to those
23 interested in the field, even if it is difficult to
24 find.

25 Next, if the claimed invention was

1 already being publicly or commercially used in the
2 United States more than one year before the effective
3 filing date of the patent application and that use was
4 not primarily an experimental use controlled by the
5 inventor to test whether the invention worked for its
6 intended purpose.

7 Also, if a device or method using the
8 claimed invention was sold or offered for sale in the
9 United States, and that claimed invention was ready for
10 patenting more than one year before the effective filing
11 date of the patent application.

12 The claimed invention is ready for
13 patenting if it was actually built or if the inventor
14 had prepared drawings or other descriptions of the
15 claimed invention that were sufficiently detailed to
16 enable a person of ordinary skill in the field of the
17 invention to make and use the invention based on.

18 For a claim to be invalid because of a
19 statutory bar, all of the claimed requirements must have
20 been either (1) disclosed in a single prior art
21 reference; or (2) implicitly disclosed in a single prior
22 art reference as viewed by one of ordinary skill in the
23 art.

24 The disclosure in a reference does not
25 have to be in the same words as the claim, but all the

1 requirements of the claim must be described in enough
2 detail or necessarily implied by or inherent in the
3 reference to enable someone of ordinary skill in the
4 field of the invention looking at the reference to make
5 and use at least one embodiment of the claimed
6 invention.

7 A prior art reference also invalidates a
8 patent claim when the claimed invention necessarily
9 results from practice of the subject of the prior art
10 reference, even if the result is unrecognized and
11 unappreciated by one of ordinary skill in the field of
12 the invention.

13 If you find a patent claim failed to meet
14 a statutory bar, you must find that patent claim valid.

15 All right. That concludes my
16 instructions with regard to the defense of invalidity
17 based on anticipation, which is Column 1 of Question 2.

18 I am now going to instruct you with
19 regard to the defense of invalidity by obviousness.
20 That would be in Column 2 of Question 2.

21 In this case, IBM also contends that the
22 asserted claims of the patents-in-suit are invalid as
23 obvious based on the Ketris, QuantumNet, RLX, and Hong
24 Kong (sic) and combinations thereof references. A
25 single reference can also form the basis for a finding

1 of obviousness.

2 A patent claim is invalid if the claimed
3 invention would have been obvious to a person of
4 ordinary skill in the field of the invention at the time
5 the application was filed.

6 This means that even if all the
7 requirements of the claim cannot be found in a single
8 prior art reference that would anticipate the claim or
9 constitute a statutory bar to that claim, a person of
10 ordinary skill in the field of the invention who knew
11 about all of the prior art would have come up with the
12 claimed invention.

13 But a patent claim composed of several
14 requirements is not proved obvious merely by
15 demonstrating that each of its requirements was
16 independently known in the prior art.

17 Although common sense directs one to look
18 with care at a patent application, the claims and
19 innovation -- that claims as innovation, the combination
20 of known requirements according to their established
21 function to produce a predictable result, it can be
22 important to identify a reason that would have prompted
23 a person of ordinary skill in the relevant field to
24 combine the requirements in the way the claims new
25 invention combines them.

1 This is so because inventions in most, if
2 not all instances, rely upon building blocks long since
3 uncovered, and claimed discoveries almost of necessity
4 will be combinations of what in some sense is already
5 known.

6 Accordingly, you may evaluate whether
7 there was some teaching, suggestion, or motivation to
8 arrive at the claimed invention before the time of the
9 claimed invention, although the proof -- although proof
10 of this is not a requirement to prove obviousness.

11 Teachings, suggestions, and motivations
12 may be found in written references including the prior
13 art itself.

14 Teachings, suggestions, and motivations
15 may also be found within the knowledge of a person of
16 ordinary skill in the art, including inferences and
17 creative steps that a person of ordinary skill in the
18 art would employ.

19 Additionally, teachings, suggestions, and
20 motivations may be found in the nature of the problem
21 solved by the claimed invention or any need or problem
22 known in the field of the invention at the time of
23 the -- at the time of and addressed by the invention.

24 Therefore, in evaluating whether such a
25 claim would have been obvious, you should consider a

1 variety of factors:

2 (1) Whether IBM has identified a reason
3 that would have prompted a person of ordinary skill in
4 the field of the invention to combine the requirements
5 or concepts from the prior art in the same way as in the
6 claimed invention.

7 There is no single way to define the line
8 between true inventiveness on one hand (which is
9 patentable) and the application of common sense and
10 ordinary skill to solve a problem on the other hand
11 (which is not patentable).

12 For example, market forces or other
13 design incentives may be what produced a change rather
14 than true inventiveness.

15 (2) Whether the claimed invention applies
16 a known technique that had been used to improve a
17 similar device or method in a similar way.

18 (3) Whether the claimed invention would
19 have been obvious to try, meaning that the claimed
20 innovation was one of a relatively small number of
21 possible approaches to the problem with a reasonable
22 expectation of success by those skilled in the art.

23 However, you must be careful not to
24 determine obviousness from using hindsight. Many true
25 inventions can seem obvious after the fact.

1 You should put yourself in the position
2 of the person of ordinary skill in the field of the
3 invention at the time the claimed invention was made,
4 and you should not consider what is known today or what
5 is learned from the teaching of the patent.

6 The ultimate conclusion of whether a
7 claim is obvious should be based on your determination
8 of several factual issues:

9 (1) You must decide the level of ordinary
10 skill in the field of the invention that someone would
11 have had at the time the claimed invention was made.

12 (2) You must decide the scope and content
13 of the prior art. In determining the scope and content
14 of the prior art, you must decide whether a reference is
15 pertinent or analogous to the claimed invention.

16 Pertinent or analogous prior art includes
17 prior art in the same field of endeavor as the claimed
18 invention, regardless of the problems addressed by the
19 reference, and prior art from different fields
20 reasonably pertinent to the particular problem with
21 which the claimed invention is concerned.

22 Remember, that prior art is not limited
23 to patents and published materials but includes the
24 general knowledge that would have been available to one
25 of ordinary skill in the field of the invention.

1 (3) You must decide what difference, if
2 any, existed between the claimed invention and the prior
3 art.

4 Finally, you should consider any of the
5 following factors that have -- that you find have been
6 shown by the evidence:

7 First is factors tending to show
8 non-obviousness; in other words, that it's non-obvious.

9 And those factors include:

10 (1) the commercial success of a product
11 due to the merits of the claimed invention;

12 (2) a long-felt but unsolved need for the
13 solution provided by the claimed invention;

14 (3) unsuccessful attempts by others to
15 find a solution provided by the claimed invention;

16 (4) copying of the claimed invention by
17 others;

18 (5) unexpected and superior results from
19 the claimed invention;

20 (6) acceptance by others of the claimed
21 invention as shown by praise from others in the field of
22 the invention or from the licensing of the claimed
23 invention;

24 And (7) disclosures in the prior art that
25 criticize, discredit, or otherwise discourage the

1 claimed invention and would, therefore, tend to show
2 that the invention was not obvious;

3 (8) other evidence tending to show
4 non-obviousness.

5 And by non-obviousness, I mean that it
6 was not obvious.

7 Now, you may consider the presence of any
8 of the factors that I've just listed for you as an
9 indication that the claimed invention would not have
10 been obvious at the time the claimed invention was made.

11 Now, (B) factors tending to show
12 obviousness:

13 (1) independent invention of the claimed
14 invention by others before or at about the same time the
15 named inventor thought of it;

16 And (2) other evidence tending to show
17 obviousness.

18 You may consider the presence of any of
19 the factors listed above as an indication that the
20 claimed invention would have been obvious at such time,
21 although you should consider any evidence of these
22 factors, the relevance and importance of any of them to
23 your decision on whether the claimed invention would
24 have been obvious is, again, up to you, the finder of
25 fact.

1 IBM must prove with clear and convincing
2 evidence -- there's that standard -- that a claimed
3 invention was obvious. If you find that the claimed
4 invention was obvious as explained above, you must find
5 that the claim -- that claim invalid.

6 Now, with regard to the scope and content
7 of prior art, ACQIS and IBM disagree on whether the
8 prior art references relied upon by IBM should be
9 included in the prior art you use to decide the validity
10 of the asserted claims.

11 To qualify as prior art relevant to the
12 patents-in-suit, these references must be reasonably
13 related to the claimed invention of that patent.

14 A reference is reasonably related if it
15 is in the same field as the claimed invention or is from
16 another field to which a person of ordinary skill in the
17 field would look to solve a problem.

18 Remember that prior art is not limited to
19 patents and published materials but also includes the
20 general knowledge that would have been available to one
21 of ordinary skill in the field of the invention.

22 In reaching your conclusion about whether
23 or not claims of the patents-in-suit would have been
24 obvious at the time the claimed invention was made, you
25 should consider any difference or differences between

1 the prior art references and the claim requirements.

2 Now, with regard to level of ordinary
3 skill, several times in my instructions I have referred
4 to a person of ordinary skill in the field of the
5 invention or otherwise referred to as ordinary skill in
6 the art.

7 It is up to you, the finder of fact, to
8 decide the level of ordinary skill in the field of the
9 invention or art. You must consider all the evidence
10 introduced at trial in making this decision, including:

11 (1) the levels of education and
12 experience of persons working in the field;

13 (2) the types of problems encountered in
14 the field;

15 And (3) the sophistication of the
16 technology.

17 ACQIS contends that the level of ordinary
18 skill in the field of the invention was at least a
19 bachelor's degree in computer science, computer
20 engineering, or electrical engineering and three to five
21 years of experience working in the field of computer
22 design, packaging, and interconnect.

23 IBM contends that an individual with
24 ordinary skill in the field would have a bachelor's
25 degree in electrical engineering and four or more years

1 of relevant experience, a master's degree or a doctorate
2 degree in electrical engineering, and two or more years
3 of relevant experience or eight or more years of
4 relevant experience.

5 All right. That concludes the
6 instructions regarding the second question, which is
7 invalidity.

8 I now turn to the third question, which
9 is damages.

10 If you find that IBM has infringed one or
11 more claims of the asserted patents, you must decide the
12 amount of money damages to which ACQIS is entitled.

13 By instructing you on damages, I do not
14 suggest that one or the other party should prevail.

15 These instructions are provided to guide
16 you on the calculation of damages in the event you find
17 infringement of a valid patent and thus must address the
18 damage issue.

19 And you saw that in the instructions. If
20 you find that it's infringed and not invalid, then you
21 find damages.

22 The amount of damages must be adequate to
23 compensate ACQIS for the infringement, but it may not be
24 less than a reasonable royalty.

25 At the same time, your damages

1 determination must not include additional sums to punish
2 IBM or to set an example. You may award compensatory
3 damages only for the loss that ACQIS proves was more
4 likely than not caused by IBM's infringement.

5 Now, with regard to the burden of proof,
6 where the party -- where the parties dispute a matter
7 concerning damages, it is ACQIS's burden to prove that
8 it is more probable than not -- that's that
9 preponderance of the evidence standard -- that ACQIS's
10 version is correct.

11 ACQIS must prove the amount of damages
12 with reasonable certainty but need not prove the amount
13 of damages with mathematical precision. However, ACQIS
14 is not entitled to damages that are remote or
15 speculative.

16 Now, with regard to when damages begin,
17 in this case, for each patent found infringed that was
18 granted before the infringing activity began, you should
19 calculate damages as of the date you determine that the
20 infringement began.

21 If you find the patent was granted after
22 the infringing activity began, damages should be
23 calculated as of the date that the patent issued.

24 Now, let me define for you reasonable
25 royalty. A royalty is a payment made to a patent holder

1 in exchange for the rights to make, use, or sell the
2 claimed invention.

3 A reasonable royalty is the payment that
4 would have resulted from a negotiation between ACQIS and
5 IBM taking place just before the time when the
6 infringement first began.

7 In considering the nature of this
8 negotiation, the focus -- the focus is on what the
9 expectations of ACQIS and IBM would have been had they
10 entered into an agreement at that time and acted
11 reasonably in their negotiations.

12 However, you must assume that both
13 parties believed the patent was valid and infringed.

14 In addition, you must assume that ACQIS
15 and IBM were willing to enter into an agreement. Your
16 role is to determine what that agreement would have
17 been.

18 The test for damages is what royalty
19 would have resulted from this hypothetical negotiation
20 and not simply what either party would have preferred.

21 You may consider expert opinions as to
22 what the amount of a reasonable royalty should be, but
23 you're not bound by any of that. You can believe all of
24 either witness or none of either witness or anything in
25 between.

1 In determining the royalty that would
2 have resulted from the hypothetical negotiation, you may
3 consider real-world facts, including the following, to
4 the extent they are helpful to you:

5 (1) licenses or offers to license the
6 patent at issue in this case;

7 (2) licenses involving comparable
8 patents;

9 (3) the licensing history of the parties;

10 (4) licensing practices in the relevant
11 industry;

12 (5) whether the patent owner had an
13 established policy of refusing to license the patent at
14 issue;

15 (6) the relationship between the patent
16 owner and the alleged infringer, including whether or
17 not they were competitors;

18 (7) the significance of the patented
19 technology in promoting sales of the alleged infringer's
20 products and earning it profit;

21 (8) alternatives to the patented
22 technology and advantages provided by the patented
23 technology relative to those alternatives.

24 I lost count, but the next one is: The
25 portion of the alleged infringer's profit that should be

1 credited to the invention as distinguished from
2 non-patented features, improvements, or contributions.

3 And, finally, any other economic factor
4 that is norm -- that a normally prudent business person
5 would, under similar circumstances, take into
6 consideration in negotiating a hypothetical license.

7 When considering evidence of licenses
8 taken by other parties in the patents-in-suit, the time
9 of the taking of the license may be important.

10 Licenses taken during an arm's-length
11 transaction before litigation begins or before threats
12 of litigation have been made may be more probative than
13 license that -- licenses that are taken during or under
14 the threat of litigation, as there may be other factors
15 at play in the litigation setting, such as, for example,
16 the cost of defending the litigation.

17 Now, you've heard testimony regarding the
18 entire market value rule. Let me explain that to you.
19 Under the entire market value rule, a patent owner may
20 recover a reasonable royalty based on the value of an
21 entire apparatus or product containing several features,
22 even though only one feature of that entire apparatus or
23 product is patented.

24 However, the entire market value rule
25 only applies where the patent owner establishes that the

1 patented feature creates the basis for customer demand
2 or substantially creates the value of the component
3 parts.

4 Now, with regard -- that concludes my
5 instructions on damages. Now I have just a few final
6 instructions for you regarding your deliberations.

7 You must perform your duties as jurors
8 without bias or prejudice as to any party.

9 The law does not permit you to be
10 controlled by sympathy, prejudice, or public opinion.

11 All parties expect that you will
12 carefully and impartially consider all the evidence,
13 follow the law as you -- as it is now being given to
14 you, and reach a just verdict regardless of the
15 consequences.

16 It is your sworn duty as jurors to
17 discuss the case with one another in an effort to reach
18 agreement, if you can do so.

19 Each of you must decide the case for
20 yourself but only after full consideration of the
21 evidence with the other members of the jury.

22 While you are discussing the case, do not
23 hesitate to re-examine your opinion and change your mind
24 if you become convinced that you are wrong.

25 However, do not give up your honest

1 beliefs solely because the others think differently or
2 merely to finish the case.

3 Remember that in a very real way, you are
4 the judges: Judges of the facts. Your only interest is
5 to seek the truth from the evidence in this case.

6 You should consider and decide this case
7 as a dispute between persons of equal standing in the
8 community, of equal worth, and holding the same or
9 similar stations in life.

10 A corporation is entitled to the same
11 fair trial as a private individual. All persons,
12 including corporations and other organizations, stand
13 equal before the law and are to be treated as equals.

14 When you retire to the jury room to
15 deliberate your verdict, you may take this charge with
16 you, as well as all of the exhibits which the Court has
17 admitted into evidence.

18 Those will be sent to you. There will
19 also be an index sheet that you can use to locate
20 specific exhibits.

21 You should first select your foreperson
22 and then begin conducting your deliberations. If you
23 should recess during your deliberations, follow the
24 instructions that the Court has given you about your
25 conduct during the trial.

1 If you -- when you retire to deliberate,
2 if you wish to take a break just to get outside or clear
3 your heads, just to take a break and want to leave the
4 jury room, please give a note -- send a note to me
5 through the Court Security Officer that you would like
6 to take a break; and at that time, I'll clear the
7 hallways, have everybody in here while you take your
8 break where you won't be bumping into lawyers and
9 witnesses and that type of thing in the hallway.

10 Then when you come back, just -- the
11 Court Security Officer will let me know you're back.
12 But while you're on those breaks, remember the
13 instructions.

14 Again, you're still not to break up into
15 little groups and start talking about the case. You're
16 only to discuss the case when all eight of you are there
17 and everyone can hear everything that's said.

18 That even applies if somebody has to go
19 to the restroom. You just all need to take a break,
20 talk about anything else, but wait till that person gets
21 back until you discuss the case further.

22 After you have reached your unanimous
23 verdict, your foreperson is to fill in on the form --
24 verdict form, your answers to the questions. Do not
25 reveal your answers until such time as you are

1 discharged unless otherwise directed by me.

2 You must never disclose to anyone, not
3 even to me, your numerical division on any questions.

4 Any notes that you may have taken during
5 this trial are not evidence. They're only aids to your
6 memory. If your memory should differ from your notes,
7 then you should rely on your memory and not on your
8 notes. The notes are not evidence, as I said.

9 A juror who has not taken notes should
10 rely on his or her independent recollection of the
11 evidence and should not be unduly influenced by the
12 notes of other jurors. Notes are not entitled to any
13 greater weight than the recollection or impression of
14 each juror of the testimony.

15 If you wish to communicate with me at any
16 time, please give a written message or question to the
17 Court Security Officer, who will bring it to me. I will
18 then respond as promptly as possible either in writing
19 or by having you brought into the courtroom so that I
20 can address you orally.

21 I will always first disclose to the
22 attorneys your question and my response before I answer
23 your question.

24 After you have reached a verdict, you are
25 not required to talk with anyone about the case unless

1 the Court otherwise -- orders otherwise.

2 Now, let me give you one final
3 instruction. And we're about through, and we'll take a
4 short break here before we hear closing arguments.

5 After closing arguments, I'm actually
6 supposed to be in Rockwall at 1:00 o'clock for a meeting
7 of the Eastern District Judges to interview magistrate
8 judges for the Beaumont Division. I'm going to try to
9 make that. I'm going to be a little bit late.

10 So I will not be here physically during
11 your deliberations, but Judge Love, who is a Magistrate
12 Judge, will be here. And so if you get a note back
13 that's signed by Judge Love instead of Judge Davis, I'm
14 not trying to get familiar with you; I'm just -- I
15 wanted you to understand who Judge Love was.

16 He's an excellent Judge. I'll be
17 available to him by phone if any matters come up, so
18 he'll have the benefit of my experience through setting
19 through the trial in responding to your questions, but I
20 just want -- I wish I could be here.

21 I always like to come back and visit with
22 the jurors afterwards to thank them for their work, and
23 I won't have the opportunity to do that this time, so
24 I'll just do it now.

25 And I do thank each and every one of you

1 for being here, for lending your wisdom, your time to
2 this collective process we call trial by jury. And I'm
3 confident that you'll reach the right decision in this
4 case. You've paid attention, you've done a good job,
5 and the Court really appreciates your service.

6 So at this time, we'll take our recess.
7 Please remember my instructions. Still don't discuss
8 the case. We'll come back at 15 minutes after 10:00, at
9 which time we'll begin closing arguments.

10 COURT SECURITY OFFICER: All rise.

11 (Jury out.)

12 THE COURT: Please be seated.

13 All right. Did the parties have a matter
14 that they wanted to take up with me before we argue the
15 case?

16 MR. VERHOEVEN: Sorry. I think we've
17 resolved it. We met and conferred since I spoke.

18 THE COURT: Great. You're doing
19 wonderful.

20 MR. VERHOEVEN: So I've been told that
21 the thing I objected to is not -- that Counsel is not
22 going to go into it, so...

23 THE COURT: All right. Very good.

24 Anything else?

25 MR. FRIEL: Yes. One very small

1 housekeeping matter. First, I think we all appreciate
2 the hard work that Ms. Werlinger has done on the
3 transcripts.

4 We've combed through them, and the
5 remarkable thing is we found only one error, and we've
6 stipulated to it. And on the February 14th transcript,
7 there's a typographical error at Page 56, Line 14. It
8 refers to Exhibit -- sorry. It -- the -- as it exists,
9 it refers to PX60, and it should be a reference to PX16,
10 1-6.

11 THE COURT: Okay. We'll make that
12 correction.

13 MR. FRIEL: Thank you.

14 THE COURT: Any other corrections or
15 suggestions?

16 MR. VERHOEVEN: I was -- I wasn't here
17 when we did the conference charge -- charge conference,
18 Your Honor, but I was informed that there was a change
19 from last night on Question 2 that basically says: You
20 only go to Question 2 if you find infringement in
21 Question 1.

22 I just wanted to inquire of Your Honor on
23 that, because I've seen it done -- for example, I did a
24 couple of trials down in Marshall last year where the
25 judge had them answer even if they found, for example,

1 non-infringement just so we would have a complete record
2 and know what they wanted to do.

3 Now, I apologize, Your Honor. I didn't
4 notice this until you were reading the charge, and we
5 got it passed out right before then. But I didn't know
6 what Your Honor's preference was on that.

7 I think I would -- well, if it's equal, I
8 would prefer them to answer all the questions just so we
9 would have a complete record.

10 THE COURT: Okay. What's the Plaintiff's
11 position with regards to that request?

12 MR. FRIEL: Your Honor, our position is,
13 we're happy with the verdict form as given. It's
14 already been read to the jury, and we would prefer to do
15 it this way.

16 MR. VERHOEVEN: There's a technical
17 matter, Your Honor. We do have a counterclaim of
18 invalidity in the pleadings, and so, you know, this
19 would -- we would request that this -- these questions
20 be answered because of those counterclaims.

21 THE COURT: So you're saying -- the
22 reason I usually do this is just so the jury can quit
23 and won't have to go into that if they don't find
24 infringement, to save them time.

25 But you're saying, even if they didn't

1 find infringement, you, under your counterclaim, would
2 still be wanting findings as to --

3 MR. VERHOEVEN: Yes, Your Honor. And I
4 apologize for not raising this earlier.

5 THE COURT: Yeah. Let me think about
6 that, and I'll -- if I decide to do it, I'll so instruct
7 the jury before we get to closing arguments.

8 MR. VERHOEVEN: Thank you, Your Honor.

9 COURT SECURITY OFFICER: All rise.

10 (Recess.)

11 COURT SECURITY OFFICER: All rise.

12 (Jury in.)

13 THE COURT: Please be seated.

14 All right. Ladies and Gentlemen of the
15 Jury, before we do the closing arguments, let me ask you
16 to do one thing. The verdict form that we passed out to
17 you, if you will, pass all of those back to the Court
18 Security Officer. I am going to take those up.

19 And then we're going to pass out a new
20 verdict form to you. And what has happened, after
21 visiting with the attorneys, I've decided I think it
22 will be simpler on Question No. 2, rather than
23 conditioning that on a finding of yes on Question No. 1,
24 just answer Question No. 2 as to each claim with regard
25 to invalidity.

1 And so you'll -- the only change we made
2 was at Question 2 where it had said for each listed
3 claim that you answered yes to Column 1, we took that
4 out.

5 And now it just says: For each asserted
6 claim of the patents-in-suit, did IBM prove by clear and
7 convincing evidence that such claim was invalid?

8 And so just answer it as to each claim
9 for both anticipation and obviousness, okay?

10 So you will fill in every blank on the --
11 on the verdict form. Make it simpler.

12 Finally, I just want to tell you, I know
13 those instructions went on for almost an hour. You are
14 probably just starting to feel like I think I understand
15 this case, and now I give you all those instructions and
16 you may be overwhelmed.

17 But, again, let me just reassure you, the
18 attorneys in closing argument are going to do an
19 excellent job. They will point out to you the
20 instructions and the evidence what they believe is
21 important, and help guide you through that.

22 And y'all just get in there and use your
23 collective wisdom, which is how our jury systems works,
24 and you'll do fine.

25 So with that, the Court will recognize

1 Counsel for the Plaintiff for purposes of closing
2 argument.

3 MR. STACY: With your permission, Judge?

4 THE COURT: Yes.

5 MR. STACY: Good morning, Ladies and
6 Gentlemen.

7 So all week you've seen patents on the
8 screen. You've seen the pictures of them, and you have
9 copies in your notebook. I just wanted to take a moment
10 to show you what this is really about.

11 Dr. Chu got three of these from the
12 United States Patent & Trademark Office. These are
13 called ribbon copies. It comes with the seal of the
14 Department of Commerce on it, a seal from the United
15 States Trademark -- or Patent & Trademark Office.

16 This is what we're here for. These are
17 very important documents. You've seen that through the
18 week; but sometimes when you see them in PDF up on the
19 screen like this, it takes away from the majesty of what
20 these things really are and how important they really
21 are.

22 Each of these three documents or these
23 three patents has a very special invention in them.
24 They all attack or all solve the problems in the prior
25 art.

1 Before Dr. Chu's invention -- you've seen
2 it all week -- no serial PCI. Or I take it back; now
3 you've seen it for two weeks. You expected to see it
4 just for one week. But all the old systems, no serial
5 PCI and the problem with that, the same problem you hear
6 with computers all the time: Slowness and bottlenecks;
7 the data couldn't go through fast enough.

8 What Dr. Chu added was serial PCI. That
9 was the key.

10 Now, he filed for his patents in 2000.
11 In 2005, IBM began incorporating this idea, this
12 invention into their own technology. And with that,
13 IBM's technology became successful, but not just IBM,
14 the whole industry.

15 The industry for blade servers changed.
16 It went from a little market, a niche industry, to a
17 multibillion-dollar industry. Blade servers became
18 important, once this invention was brought in.

19 Now, if you remember on the first day,
20 Dr. Chu drew on the board to try to explain in his own
21 words what his invention was, what he was trying to
22 solve.

23 So if you remember, up at the top, he
24 drew the old computer. And in that, you see the old PCI
25 bus right here (indicates). That PCI bus, the best way

1 to visualize it -- and I grew up in the Texas Panhandle,
2 a lot of two-lane roads, and you'd get one lane shut
3 down while they were repairing it, and inevitably, you
4 would have to stop and the traffic come one way, all the
5 traffic would clear, and then they'd let the other one
6 go. And if you've ever been in a hurry, that is just
7 the worst thing in the world.

8 But computers are always in a hurry, and
9 that was the problem with the old systems. And it's
10 even a bigger problem when you start putting multiple
11 computers together in those kinds of form factors.
12 That's what Dr. Chu knew, and so he came up with this
13 idea.

14 That is serial PCI. That's what you saw
15 in his claims. This solved the bottleneck problem.
16 This allowed everything to work faster. And this is
17 what the Patent Office granted the patents on, three of
18 them, on this invention, three separate patents.

19 And you heard Counsel from IBM talk about
20 it's one invention; it's one patent. Well, folks, I
21 don't know what they're talking about. This is what the
22 Patent Office gave Dr. Chu: Three patents.

23 Now, that was his drawing here in court.
24 Here's the one exactly out of his patents. It's
25 Figure 8. You can see the same type of issues going on

1 here with what he fixed. Never been done before. You
2 heard about the northbridge and the southbridge and the
3 serial PCI. That's what Dr. Chu added.

4 And what happened when Dr. Chu's
5 invention was put out there?

6 People recognized the value of it.
7 You've seen this chart over and over. Other blade
8 server manufacturers recognize that serial PCI is the
9 way of the future. That's the way you have to go. And,
10 in fact, what you know now is that all blade servers are
11 relying on serial PCI. They've now moved completely to
12 Dr. Chu's invention.

13 So this is really not a fight about
14 whether IBM will compensate Dr. Chu for his invention.
15 So let me take on some of their argument, and I'll just
16 take them from what you heard yesterday. So we'll start
17 with validity.

18 Start with Dr. McClure. So what do we
19 know about Dr. McClure?

20 What we know about Dr. McClure is that he
21 is a man known for giving invalidity opinions. You
22 heard from his testimony -- Mr. Brogan drew it out --
23 that in his entire career he's never found a patent
24 valid. Every time he's asked to opine, he opines the
25 patent is invalid. He's known for that.

1 It's no wonder that IBM went to him to
2 give an opinion in this case.

3 And what you also heard is when he was
4 asked about what were you asked to do in this case, he
5 said: I was hired to give an invalidity opinion. It's
6 his testimony. I was hired to give an invalidity
7 opinion. Not to give his opinion, not to give an
8 objective analysis. He was hired to do what he always
9 does: Give an invalidity opinion. It's no surprise
10 that's what he did.

11 But to get there in this case, he had to
12 ignore quite a few facts. The first thing he had to
13 ignore is the fact that all of the other license -- or
14 all the other licenses that were put out there, these
15 people recognized the validity of Dr. Chu's invention.

16 You heard about it in the Judge's
17 instructions, something called secondary indicia of
18 non-obviousness. Leave it to the Supreme Court to put a
19 big term on common sense.

20 If a bunch of other people acknowledged
21 the patents, maybe that's a data point you should
22 consider. It's not the only thing, but maybe you should
23 consider it.

24 Dr. McClure didn't consider it.

25 You remember the Dell white paper. This

1 was from 2004 or four years after Dr. Chu filed his
2 invention -- or filed for his patent application.
3 Dr. McClure didn't consider this document. But what
4 does it say?

5 The new bus technology is expected to
6 allow the PCI Express transmission rates.
7 New bus technology in 2004. And just to make clear, it
8 applies to servers.

9 Figure 13 shows how PCI Express could be
10 implemented. Could. Not "has been." Not "was
11 implemented in the '90s," but "could be implemented."

12 And the reality is, Dell came out with a
13 product several months later, the first in the industry,
14 with blade server and integrated PCI.

15 Dr. McClure didn't consider it.

16 Dr. McClure opined on RLX and said RLX
17 renders all these patents invalid. Did he once mention
18 who owns RLX; the fact that Hewlett-Packard bought RLX?

19 If anybody knows about RLX, it's probably
20 Hewlett-Packard; not Dr. McClure, not IBM. Something
21 else he forgot to consider or at least mention to you.

22 You heard Mr. Verhoeven mention several
23 times in the trial that certain pieces of prior art
24 weren't considered by the Patent Office, and you heard
25 it in the Judge's instructions. Something to think

1 about, something to consider.

2 Well, if you're going to consider that,
3 wouldn't you like to know the other side, what was
4 considered?

5 So when you go back in the jury room,
6 pull up these three patents. Turn to the second page.
7 You'll see a list of patents; you'll see a list of
8 documents. Those are the things considered by the
9 Patent Office. Those are the things known by the Patent
10 Office before they sent Dr. Chu these.

11 And what are you going to find in there?
12 Remember Hong? You're going to find Hong in there.
13 Nobody bothered to tell you that.

14 And what else are you going to find?
15 Remember QuantumNet and Mr. Pocrass? You're going to
16 find Pocrass in there. The Patent Office knew about
17 Pocrass' work. There they knew about his patent. So
18 you won't see the word QuantumNet, but you'll see the
19 Pocrass name.

20 So now let's look at Dr. McClure's
21 individual opinions. See if I can put a little light on
22 this. What do we know?

23 We know from RLX what Guy Irving had to
24 say. Unequivocal: No PCI Express in the old RLX server
25 system. That means there's no serial PCI. No debate.

1 You see the same thing for Ketris. Jim Medeiros: No
2 serial PCI.

3 And you see the same thing for
4 QuantumNet: No serial PCI.

5 None of those systems had Dr. Chu's
6 serial PCI. So those three witnesses left IBM in a
7 little bit of a bind. Their whole theory about the
8 exact math -- we'll show you that it's exactly there --
9 fell apart coupled what they're going to have to do.

10 But better before I tell you, remember
11 Dr. Gafford. Dr. Gafford -- I want you to recall his
12 testimony, and I'm going to point to him several times
13 as we go through this, because Dr. Gafford gets fired up
14 in a way only an engineer can get fired up about this
15 kind of material.

16 So first, remember the most important
17 thing here -- you saw a debate about it yesterday -- PCI
18 bus transaction. This is what we're looking at, but
19 we're going to look at it in terms of the whole claim.

20 So there are two things that we care
21 about, and these claims are representative of all of
22 them: An interface controller and an ethernet
23 controller. Notice they're two different things.

24 Now, I have to remember this and memorize
25 it by focusing on the first letter, I and E. An

1 interface controller is for internal communications.

2 That's what Dr. Gafford said: I to I.

3 Ethernet controller here for external communications; E
4 to E.

5 Helps me keep it straight in my mind at
6 least. So two separate components.

7 Now, you didn't see Dr. McClure focusing
8 on these two separate components. He tried to ignore a
9 lot of the language up here and just focus on something
10 down here (indicates). But the fact is,
11 internal/external.

12 You see this in the picture that Dr. Chu
13 drew. Here, internal; out here, ethernet, external
14 (indicates). Those are the two separate elements.

15 Why do you need them? Because you need
16 to talk inside your computer and outside your computer.
17 You're in an office building. You need to talk within
18 your office. You need to talk outside your office.
19 They're two separate things.

20 The other thing that's important is this
21 PCI address. This is for internal. Somebody described
22 it as your internal mail routing at work.

23 External, it has no meaning; it's
24 gibberish.

25 These two things speak a different

1 language. That's why you have to have both of them, and
2 that's why Dr. Chu has both of them in his claims.

3 Now, this was IBM's slide, and I'll try
4 to be very clear about that today. You'll see this
5 stamp, if I'm using something that they put in front of
6 you. They brought this up and said other serial
7 protocols that meet claim language. Their language --
8 it's theirs, not mine.

9 But all of these are external, starting
10 with ethernet. Ethernet, external. Not a single one of
11 those has anything to do with an interface controller.
12 Not a single one of them can speak the right language to
13 be internal. These are all external.

14 Let's take a look at the claim, and I'll
15 give you a specific example of what Dr. McClure tried to
16 do.

17 Here, this is the claim: The interface
18 controller, and an ethernet controller. So they pulled
19 up -- Dr. McClure pulled up this picture from Ketris,
20 and maybe you remember this one. And then he pointed to
21 these two orange things and said: Well, one is an
22 interface controller and one is an ethernet controller.
23 Satisfies everything.

24 I see some people squinting, so let me
25 see if I can help.

1 Here's what those two things are. They
2 are the same thing. Dr. McClure pointed to two ethernet
3 controllers and what he said is: Well, that's an
4 ethernet controller, and that's an interface controller.

5 Folks, two ethernet controllers are two
6 ethernet controllers. There is no interface controller
7 in this system.

8 So Dr. Gafford -- and we told you he gets
9 a little bit fired up -- he was pressed on this issue
10 that ethernet and interface controllers, well, they're
11 just the same. His quote -- and I have to read it to do
12 it justice:

13 The idea of pitching ethernet as a
14 substitute for PCI is --

15 I'm sorry, Counsel.

16 -- it's nuts.

17 Well, that's his opinion. But you can
18 see for yourself in that claim language, there are two
19 separate things required there. Those of skill in the
20 art understand that interface controller, internal;
21 ethernet controller, external. They're trying to pull a
22 fast one.

23 So what did they do? They retreat from
24 that position, or at least have another backup plan. So
25 now we're on Backup Plan No. 2 and they say: Well,

1 okay, so we're wrong with all of those arguments. You
2 can take Ketris and RLX and QuantumNet and you can just
3 combine them with Hong.

4 Remember, Hong considered by the Patent
5 Office. You can just plug it in. Well, my gut reaction
6 is no, but I don't matter.

7 When you talk to the experts, what you
8 get pointed out is that Hong is about this cable. What
9 are blade servers about? Eliminating cables.

10 When you looked at any of those over
11 there -- remember the IBM system in the back that
12 Mr. Yost displayed? Did you see cables hooking one
13 blade to the next?

14 The whole point of blade server is that
15 you can just plug them in and pull them out. The point
16 is to eliminate cables. But what they're telling you
17 is, oh, you can just combine it by -- by what?

18 Whatever you're going to come up with,
19 just have lots of cables. This is that hindsight
20 reconstruction.

21 But what Dr. Gafford -- or Mr. Gafford
22 says is that it doesn't even make sense. It won't work
23 if you put it together. It defeats the very purpose of
24 a blade server.

25 Remember, the cable ball video, the

1 commercial? That's how important eliminating cables is
2 to blade servers, yet Dr. McClure is here to tell you,
3 oh, go ahead and put those cables back in; no problem at
4 all.

5 It doesn't make sense.

6 That secondary indicia of non-obviousness
7 comes back to this: If it was so obvious, if it was so
8 easy, why did all of these people take a license?

9 And Counsel may try to pitch that these
10 are nuisance licenses. It's just to avoid litigation.

11 Folks, there are two things about these
12 licenses. First, some of them are very substantive;
13 but, second, they're all consistent within a range that
14 shows everybody is paying according to what they're
15 selling. That's the fair way to charge.

16 So all of these have merit. You should
17 think about it. Why would these people take a license
18 if it was just so obvious?

19 So what that leaves IBM with is three
20 positions in their invalidity case. This is kind of a
21 continual fallback position from a man that's very, very
22 skilled, but who decide -- remember, he testified that
23 he said he's not seen anything new in the computer
24 industry since the '90s?

25 He believes it. That didn't stop IBM

1 from filing for thousands of patents a year in the
2 computer industry. He's just too extreme for analyzing
3 patents. He's too extreme to be helpful in his
4 analysis. And he overlooked too many things to get to
5 his opinion.

6 So IBM says, well, if you're not -- if
7 the patents are invalid, we don't infringe. You're
8 beginning to see a little bit of Mr. Chandler's Fido
9 argument. Oh, not my dog. So we don't infringe. They
10 put up the computer modules.

11 So you'll remember this issue. This is
12 the language: And wherein each of the computer modules
13 operates fully independent of each other.

14 IBM got a little surprise from their own
15 witness, Bill Holland. You remember Mr. Holland? He
16 was the man that IBM -- for 20-plus years, he was the
17 one that worked on blade servers. What did he have to
18 say about IBM's initial theory?

19 Mr. Holland didn't think about what the
20 lawyers were putting out there. Will operate fully
21 independently? Yes.

22 You can tell when Mr. Brogan was shocked:
23 Okay. You're very clear on that?

24 Yes.

25 Not what anybody expected, but what you

1 saw there was one of the majesties of this process. Why
2 you take the oath, why you sit in that stand, why you
3 have to stare at the jury. Because the truth comes out.
4 It's hard to sit there and evade answers.

5 Mr. Holland got a chance to say it again.
6 And in this particular case, after IBM worked him over a
7 little bit in redirect, this is what he came back with.

8 He said it again: They do operate fully
9 independently of each other when operating correctly.

10 So IBM's new position is, if they're
11 broken, they don't operate independently. Well, folks,
12 when they work correctly, they operate independently;
13 and that means when they're working correctly, they
14 infringe.

15 I'm going to represent to you right now
16 we want no damages on their broken products. That's not
17 what we're after. What we're after is the ones that
18 operate correctly.

19 This is just a bizarre excuse. What you
20 know, though, is they operate independently when they're
21 working as they were designed to work.

22 So to fix this little surprise, what does
23 IBM do?

24 They come back and start pointing to the
25 management module. You remember that management module

1 they were talking about?

2 Your Honor, may I approach the --

3 THE COURT: Yes. Yes you may.

4 MR. STACY: So if you remember that
5 management module, this was the blade (indicates).

6 I promise I won't drop it.

7 This was the blade. The management
8 module has walked away from me. The management module
9 is this size (indicates). You remember they put up the
10 picture. This is actually the switch, but they are
11 these different things.

12 These are two blades. These are the two
13 things that go in the front.

14 But IBM's position is, hey, we'll just
15 point to the management module. Well, what's the number
16 one requirement to be a computer module under the
17 claims?

18 So we go right back to the claim
19 language. The claim language requires plurality of
20 computer modules that has a processing unit, a main
21 memory, and an interface controller with serial PCI. To
22 be a computer module under the terms of the claim is
23 what it must be.

24 And what did we learn?

25 What we learned is that this management

1 module doesn't have that interface controller. It
2 doesn't have serial PCI. It's not in it. It doesn't
3 count as a computer module under the terms of the claim.
4 IBM's trying to squeak one by and just kind of ignore
5 that.

6 And don't take my word for it. We will
7 go right back to the man who knows. What did
8 Mr. Holland have to say?

9 Sitting here today, you're not aware of
10 any management module that's been sold by IBM that has a
11 PCI Express in it?

12 No, I am not.

13 Remember, PCI Express and serial PCI are
14 the same thing. PCI Express is the brand name, like
15 Dr Pepper. Serial PCI is the generic name, like cola or
16 soda, or for me, Coke. I use it generically and for the
17 real thing.

18 But at the end of the day, that's what
19 you know from the evidence. IBM's own witness confirms:
20 Management modules aren't computer modules. So there
21 goes their fallback position for infringement.

22 Now, they come up with the Fido argument.
23 Well, we may infringe. The patents may be valid, but
24 even if they are, we only infringe a little bit.

25 Remember that whole thing about

1 unassembled sales?

2 Well, we ship things in separate boxes.
3 We don't put it together. Our customers put it
4 together, so we shouldn't be held liable.

5 Mr. Ratliff knocked off 40 percent --
6 what 40-plus percent of his damages numbers for
7 unassembled sales. Had no real explanation for one, but
8 he knocked off a huge portion, hundreds of millions of
9 dollars in sales.

10 But you heard the Judge say sales and
11 offers for sale are infringement. When you get your
12 jury charge, go look at it.

13 And what does IBM do? Unequivocal from
14 Mr. Yost who's been IBM's representative for this entire
15 trial, who heads this division, what does he have to
16 say? IBM sells infringing blade servers.

17 And what about offer for sale? This is
18 not an escape route for them to get away from
19 infringement. They sell; they offer for sale; they
20 manufacture these products.

21 So you turn to IBM's damages case now.
22 So this is the next piece of it. Well, okay, but we
23 only owe a little bit. We only owe a little bit. And
24 they put up Mr. Ratliff for this.

25 So, first of all, you remember

1 Mr. Ratliff doing the calculations on HP and getting to
2 that .12 percent? Recall that?

3 Why didn't he do anything for the rest of
4 people on the chart? Ten people; he picked one. I
5 think that's cherry-picking.

6 Remember this slide (indicates)?

7 Now, when it was originally used, I think
8 this number was 62. It was used to cross Dr. Vellturo.
9 So now between when he was crossed and today, it's grown
10 to 86. It's an IBM slide. I don't know why, but it
11 doesn't really matter.

12 Now, again ten licensees. One, two,
13 three, four, five, six (counts). Why did they leave the
14 other four off?

15 I think you know why. Because they don't
16 like how their graph looks with them. Plus, you heard
17 Dr. Vellturo say it's not fair; it's not even a fair
18 depiction, because you've got to compare the amount of
19 sales before you can just look at raw amounts paid.

20 SuperMicro is a lot smaller than IBM, so
21 it should pay a lot less, because it sells less product.
22 But they tried to trick you with this, trying to make
23 you think that we're seeking something outrageous,
24 completely unlike anything else. It's not the case.

25 You've seen this (indicates). Same type

1 thing. I think you're going to see it again today.

2 Same type thing. They show you HP. I don't agree with
3 a number on this slide, but I want to show you something
4 more important.

5 Why did they pick just HP? Let's assume
6 it's all correct, which none of it is, but assume it's
7 all correct. Why HP? Why isn't Dell, Oracle,
8 SuperMicro, Hitachi, Fujitsu -- why are they not on this
9 chart?

10 Because it doesn't look good. They want
11 to make this point and sell you this bill of goods
12 without showing you everything else.

13 So you run through some of the other
14 issues. Remember the continuation issue. Well, they
15 said continuations count as one patent. I said at the
16 beginning, the Patent Office issued three patents, but
17 IBM is saying, oh, it's just one. No idea where that
18 comes from.

19 They didn't put any documents in front of
20 you saying this is our policy.

21 This is what we know. This is from their
22 website. What do they tell the world?

23 They make no distinction in their policy,
24 their public-announced policy, between continuations and
25 any other type of patent. A patent is a patent, period.

1 I'd offer that that's an argument or an excuse that was
2 recently developed.

3 My favorite that I heard: Mr. Yost leans
4 forward in the microphone and says: I shouldn't -- I
5 don't want to say this, but we're not making a profit.
6 We've lost money for the last seven years.

7 Really? That doesn't even pass the
8 straight-face test.

9 What did he testify to? There are their
10 target margins. He said, well, those are target
11 margins; we didn't hit any of those. But that's what he
12 testified to. Those are his target margins. He wasn't
13 trying to lose money.

14 But what did Dr. Vellturo find? After
15 combing through all of IBM's financial records of 3
16 million entries, he found an 18-percent profit.

17 So for their almost a billion dollars in
18 sales over the last two years, that's \$180 million in
19 profit. That's what Dr. Vellturo found from their
20 numbers. They didn't offer you any analysis on their
21 part. Instead, they just threw out we're not making any
22 money. The numbers, the math, their books show an
23 entirely different story.

24 And I'm skipping some of these just to
25 move forward on time.

1 The next thing they throw up: Oh, well,
2 we've got a bunch of non-infringing alternatives. We'll
3 just switch to those. We don't need Dr. Chu's
4 invention. We'll just abandon it.

5 Well, and they throw out some numbers.
6 These are BladeCenters they said they can move to. But
7 you heard Mr. Yost: Discontinued, not acceptable today.
8 He wanted to fight a little bit; but at the end of his
9 testimony, he said, okay, they're not acceptable today.

10 And then he confirmed why: No serial
11 PCI.

12 They've abandoned these products for a
13 reason. They won't go back to them for a reason. IBM
14 walks away from that argument and says, oh, well, we've
15 got racks and servers and tower servers. That's what
16 we're going to move to.

17 Folks, remember the cable ball video that
18 solved this problem?

19 For the people that need this problem
20 solved, they want blade servers. And IBM threw up this
21 slide to say, well, the 2 to 4 percent, look it's just a
22 tiny bit of our business. That's a billion-dollar slice
23 of pie. For that billion dollars' worth of sales, those
24 people want blade servers.

25 IBM can't move to rack servers, and this

1 is why. Mr. Yost confirmed that blade servers are
2 growing faster than any other segment of the server
3 business. It's the future. The future is a blade
4 server with Dr. Chu's invention.

5 This is where we started the week, and I
6 want to talk to you about the evidence on our case, what
7 Mr. Chandler said he would prove when he started.

8 So we have the infringement. I promised I wouldn't mock
9 my friend and partner for his wonderful checkmarks on
10 the board. But you remember when he had the big board
11 up, we were all afraid for his safety and ours with
12 those checkmarks.

13 He went through that in excruciating
14 detail at times, and I even knew what was coming and
15 it's tough, because it's a lot of detail. You've got to
16 go through each one of them. But you remember that he
17 did.

18 We showed the video of the IBM witnesses
19 telling you what was in those products. Went through it
20 in excruciating detail, because you have to get every
21 checkmark.

22 When you go back into the jury room, keep
23 that in mind. Remember that evidence, but you're going
24 to get something else called a request for admission. I
25 think it's going to be in a folder marked something

1 along the lines of joint exhibit.

2 These are signed IBM admissions about
3 certain things, not all things but some things. So you
4 take that -- and when I say some things, it's about
5 what's in their accused products.

6 So when you take that, those admissions,
7 combine it with that testimony, what you end up with are
8 the not-so-elegant charts that Mr. Brogan had up on the
9 stand.

10 I will not subject you to his checkmarks
11 again. The miracle of PowerPoint, this is what it turns
12 out to be.

13 Sorry, Jim.

14 And as you go through each one of the
15 claims, just remember what Mr. Brogan did. I've got a
16 feeling you won't forget it, and it will stick in your
17 mind for a long time about this is what patent lawyers
18 and patent litigators do all day.

19 My wife tells me when I started this
20 case, I had hair, so it tells you that it's -- actually,
21 I think she just doesn't like my hair.

22 But at the end of the day, this is what
23 we want: This fence rebuilt. We want the property line
24 established around Dr. Chu's patents again. And we want
25 to put IBM back on IBM's side. It's a simple request.

1 Dr. Chu's property; he just wants to protect it.

2 So how do you do that?

3 Remember Dr. Vellturo. Dr. Vellturo,
4 Ph.D. out of MIT in economics, adjunct professor of
5 finance at the University of Boston -- I'm sorry --
6 Boston University.

7 And then when you look at all of his
8 experience, you remember his CV that went up on the
9 board. He works for the Justice Department in analyzing
10 mergers. This is a guy who knows his stuff. Absolutely
11 knows his stuff. And he's got extensive experience in
12 combing through books, analyzing financial records. You
13 heard the phrase, forensic accounting. That became a
14 big deal -- become a very big deal over the last five or
15 six years analyzing books, finding missing records.
16 This is what the man does.

17 And when he did that, remember this? We
18 put up a piece of it. The complete chart is
19 frightening, 3-plus million entries on just these
20 products, not all of IBM's products but just the accused
21 products.

22 He crunched through 3 million records and
23 distilled it down, and it's almost shameful to reduce
24 his work to this, but that's what he managed to do.
25 He's good at what he does.

1 And so at the end of the day, what he
2 calculated, here were IBM sales for the chassis and
3 blades. Here were those unique options, and that's the
4 total sales: 1 percent per patent, you get to this
5 number (indicated), not a rounded \$3.5 million number.

6 This is the mathematical precision that
7 comes with an accountant, with somebody that specializes
8 in finance.

9 So if you haven't written this number
10 down, I'm going to recommend you do, because that is
11 actually the damages number, not 27 million, but
12 26,999,166. I think he did round off the cents part.

13 Dr. Vellturo, Mr. Murtha -- you remember
14 Mr. Murtha was very, very conservative. Remember, he
15 put this up: Blade, chassis, blade, unique options. He
16 drew it on the board. Said he excluded these two
17 categories. He was asked what those two categories
18 were.

19 Well, over \$300 million, according to Dr.
20 Vellturo. He wouldn't put those in his base. Now, he
21 gave that number to Dr. -- or Mr. Murtha to be used in
22 the royalty calculation, but Dr. Vellturo didn't put
23 them in his base.

24 Remember Mr. Murtha, 41-plus years in
25 doing patent licensing; 28 at IBM, 14 out on his own.

1 Represents most of the major universities on the East
2 Coast. Does all the patent licensing for American
3 Express. This is one of the most distinguished men or
4 people in this field, period. He has been around a
5 long, long time.

6 Remember, he was the director of IBM's
7 licensing for 14 years, but he's learned a lot since
8 then. It's not just his knowledge from IBM. He's got
9 14 additional years of knowledge. I don't think -- if I
10 did my math right, he retired in '97, so 14 additional
11 years doing licensing negotiations for other people.

12 Remember what he said? He's done
13 500-plus negotiations. So what did he come to as a
14 reasonable royalty rate? 3 percent.

15 How did he get there? It wasn't based on
16 one thing. It was based on a whole host of factors.
17 Remember that 15 factors, Georgia-Pacific analysis he
18 went through?

19 So you start with IBM's substantial
20 margins. You've got the target margins of 20 percent.
21 You've got Dr. Vellturo's 18-percent calculation.

22 You've got the IBM practice. It's not
23 that IBM follows that practice that matters.

24 What matters is that IBM is so big, so
25 powerful that when it puts out a policy like that, other

1 people look at it and gravitates toward it. And that
2 policy, which you heard from Mr. Murtha, has impacted
3 the computer industry. Other people have started
4 quoting it and using it. That's from Mr. Murtha's
5 personal experience from -- since leaving IBM. He's
6 seen the effects.

7 Down here, success of IBM's new blade
8 servers. You notice their sales have taken off, right
9 at a billion sales in the last two years. All of the
10 extra sales -- I just mentioned the 300 million in extra
11 sales -- those are extra things to be considered here.
12 They weren't in the base, but Mr. Murtha considered them
13 to justify the royalty.

14 And then those licenses. Looking at them
15 altogether, you saw the range from 2.8 to 5 percent.
16 Mr. Murtha's 3 percent is at the lower end of that. But
17 that was the key to what Mr. Murtha was saying. It's
18 not about one piece of evidence. It's about following
19 all of it, looking at everything together, and that's
20 what takes you to 3 percent.

21 And I just wanted to, again, show you
22 that I'm not hiding anything here. But as you see, 2.8
23 to 5 percent, 5 percent in the future, those are the
24 rates that Mr. Murtha considered.

25 So I'll leave you with the last piece,

1 and that's the verdict form that's just been handed out
2 to you, the revised one. And I want to make sure that I
3 give you or talk to you about the revised one.

4 So if you look at the revised one, it's
5 pretty straightforward. What ACQIS submits to you is
6 that the first page: Did ACQIS prove by a preponderance
7 of the evidence that IBM infringed?

8 It's all yeses.

9 When you turn to the second page: Did
10 IBM prove by clear and convincing evidence that such a
11 claim is invalid?

12 Now, remember that difference in the
13 standard. That clear and convincing, that is a big
14 standard. Why is that a big standard?

15 This is why (indicates), because it's
16 presumed the Patent Office did its job. So what you're
17 having to do, in essence, here is you're deciding, did
18 the Patent Office made a mistake three times? That's
19 why it's that clear and convincing evidence standard.
20 So on this page it's all nos.

21 And then the final piece, No. 3: What
22 sum of money? There, that's why I suggested you write
23 it down. The sum is not 27 million; it's 26,999,166.

24 Thank you.

25 THE COURT: All right. Thank you,

1 Counsel.

2 All right. The Court will recognize
3 Counsel for the Defendant for purposes of closing
4 argument.

5 MR. VERHOEVEN: Can we have an
6 audiovisual person?

7 THE COURT: It will take just a second.
8 (Pause.)

9 MR. VERHOEVEN: Okay. Your Honor, may I
10 proceed?

11 THE COURT: Yes, you may.

12 MR. VERHOEVEN: Good morning, Members of
13 the Jury. Let me start by again thanking you for your
14 service and the careful attention you've been paying
15 before I get into my closing statement in this case.

16 As you know, my client, IBM, has two
17 defenses to this charge in this case.

18 The one we spent the most time on is
19 invalidity. And IBM believes that it's shown that the
20 six asserted claims of the continuation patents in this
21 case are invalid because somebody else did it first.

22 The folks at Ketris did it first. And we
23 had Mr. McClure up here, and he walked through element
24 by element showing you the physical exhibits and
25 documentation as to why Ketris -- the Ketris folks did

1 it first.

2 As the Judge instructed you, you can't
3 get a valid patent if somebody else did the same thing
4 first. We believe the evidence shows the folks at
5 Ketris built this system first.

6 We presented evidence to you that -- a
7 timeline showing they did it before the March 12th date
8 of 2000 that the Court said is the critical date.
9 That's undisputed. Their expert doesn't dispute it.

10 Prior art. And we went through and we
11 showed you element by element, and I'll get into that.

12 Importantly, you didn't hear anyone say
13 that the Ketris system was before the Patent Office.

14 Now, Counsel has said: Well, IBM wants
15 you to conclude that the Patent Office made a mistake.
16 Well, no, no. You don't make a mistake if you don't
17 even know that the system exists. That's our point. No
18 one told the Patent Office that Ketris was out there.

19 And you remember my opening statement, I
20 asked you to bear in mind one question on invalidity as
21 you heard the evidence; and that question was: What if,
22 what if the Examiner at the Patent Office knew about the
23 systems, the prior art systems that you're learning
24 about?

25 Would they have issued these continuation

1 patents if they had known that there's a system out
2 there -- you saw it; it's right over here in the box --
3 that does every single thing in the six asserted claims
4 of these patents? Would they have issued these patents?
5 We think that you'll conclude the answer is no.

6 We also have our second defense, which is
7 non-infringement, and I'll go into that in a minute as
8 well.

9 Each of the asserted claims in this case
10 have an element that says that each of the computer
11 modules in the plurality of computer modules must
12 operate independent of each other.

13 And we showed you evidence that the IBM
14 accused system, there's a computer module called the
15 management module. That's one of the each computer
16 modules that has to operate independently of each other.

17 And the evidence is undisputed -- and
18 I'll go through it in more detail in a moment -- that
19 with respect to the IBM system, the blade servers cannot
20 operate independently of the management module. It's
21 not a dispute about that.

22 So I encourage you, when you -- when you
23 go back and you look at the claim language, the claim
24 says you have a plurality of computer modules. The
25 blades are computer modules. The management module is a

1 computer module.

2 And it has certain requirements for those
3 computer modules. One of the requirements is that each
4 of these computer modules operate independently of each
5 other.

6 The management module -- it's undisputed,
7 undisputed -- does not operate independently of the
8 blade server model and vice versa. So this element
9 isn't met.

10 And you heard on the cross-examination
11 that I did of Mr. Gafford that he admits it, too.
12 And you also heard that -- on the cross-examination,
13 that this requirement of independent operation is an
14 element in each and every one of the six asserted
15 claims.

16 Now, it's the Plaintiff's burden of proof
17 to show infringement. So if you conclude they haven't
18 shown that each of these modules, the management module
19 and the blade server module, operate independent of each
20 other, according to the Judge's instructions, you are
21 required to find non-infringement because an element of
22 each of the claims is missing.

23 Now, I'm going to go into these defenses
24 in more detail, but let me back up for a minute and talk
25 about the parties in this case and what the evidence has

1 shown generally.

2 Now, IBM takes this case very seriously.
3 We've brought Mr. Yost here, the Vice President of the
4 business; that he has taken out of his time and made
5 sure he was here for every single day of this trial.

6 And he came and he talked to you about
7 the business. He talked to you about IBM and the
8 BladeCenter product, and he showed you that IBM has been
9 a U.S. patent leader for 18 years. He explained that
10 the accused BladeCenter system, he told you that IBM had
11 multiple patents of its own on this product.

12 The evidence has shown that IBM is a
13 major employer both in the United States, with over a
14 hundred thousand U.S. employees, 9,000 in Texas. IBM
15 makes things. It makes innovative products, and it gets
16 patents on those products as a patent leader. It has
17 been for years.

18 We also brought, so that you could hear
19 him testify, Bill Holland. Mr. Holland began working on
20 BladeCenter in 1999. He talked about how -- the months
21 he spent working on strategies for optimizing this
22 technology that IBM has.

23 He told you that the IBM BladeCenter
24 product was commercially released in 2002. 2002, years
25 before any of the three patents in this case even

1 issued, IBM has already developed the product. It's
2 already on the marketplace.

3 It's not till years later that these
4 patents come out, and now, after the fact, the Plaintiff
5 says: Well, IBM should be liable, even though it
6 developed the technology before these patents issued.
7 Is that fair? We don't think it is.

8 Now, let's look at what the evidence has
9 shown about ACQIS, which is the Plaintiff in this case.

10 What is ACQIS? ACQIS LLC, that's the
11 Plaintiff. What is it? It's a shell corporation, a
12 shell corporation formed for the purpose of bringing
13 this litigation in Texas.

14 Well, who's the only full-time employee
15 of this shell corporation? Well, Mr. Chu. Well, he
16 lives in California. That's what the evidence has
17 shown.

18 And the evidence has also shown, Members
19 of the Jury -- you'll remember on cross-examination,
20 when I was cross-examining Dr. Chu, that he used to work
21 at a company called CIRRUS. Remember that?

22 And he was the Chief Technology Officer
23 at CIRRUS, important technological executive of the
24 company. And he testified: Well, I left CIRRUS on
25 December 5th. And then within about three weeks, you

1 hear the Plaintiff say: Here, this is a really
2 important invention. It's a real breakthrough. It's
3 valid and new and unique, and you should award millions
4 of dollars in damages for it.

5 Well, let's look at how he came up with
6 this. He leaves CIRBUS on December 5, and then in
7 approximately three weeks, he writes the white papers
8 that come up with his invention.

9 Here's the testimony.

10 QUESTION: So from start to finish, this
11 invention that you've been talking about took you about
12 three weeks. You didn't create any prototypes to see
13 how the invention would work during this timeframe, did
14 you?

15 ANSWER: No.

16 QUESTION: You didn't rely on any
17 research when you wrote those white papers, did you?

18 ANSWER: No.

19 He just did it off the top of his head.
20 But yet he said he came up with a new and unique
21 invention.

22 The facts are, as we established on
23 cross-examination as well, that Mr. Chu never
24 successfully commercialized his alleged new invention.

25 With respect to the multi-modular

1 computer system, he never even tried to assemble any
2 equipment to make it. He never built any prototypes of
3 it. He didn't do anything.

4 So we've got IBM that makes things of
5 value for people; and we've got the Plaintiff, who files
6 patents and doesn't even bother to try to make anything.

7 That's what we're looking at in this
8 case.

9 Now, one of the things you're going to
10 have to do in this case is assess credibility and weigh
11 the evidence. And Mr. Chu -- Dr. Chu's testimony bears
12 on that.

13 This brand new, great invention that he
14 created, I asked him at his deposition -- the whole
15 point of this invention, by the way, Members of the
16 Jury, is what's called modular PCs. You have these
17 modules, and you take them in, and you pull them out.

18 You remember Figure 1 from the patents
19 we've seen a couple of times with the little yellow
20 squares that got pulled out and put in? Those are the
21 modules. That's his invention. We've got the patents,
22 at least that's what the patent says his invention is.

23 So I asked him at his deposition:

24 QUESTION: You had -- had you had
25 experience with modular computers prior to leaving

1 CIRRUS?

2 ANSWER: There was no such product.

3 Sworn testimony by Dr. Chu.

4 QUESTION: And when you say there was no
5 such product, what do you mean?

6 ANSWER: I was not aware of any such
7 product.

8 QUESTION: No awareness of modular?

9 ANSWER: No.

10 Sworn testimony at his deposition.

11 But then on cross-examination in this
12 trial, I showed him his own inventor notebook that he
13 had created while he was at CIRRUS.

14 Now, remember, he just testified under
15 oath he had never heard modular PCs.

16 Frank, can we bring up this handwritten
17 bit here (indicates)?

18 And this is the excerpt in his own
19 handwriting, from his own notebook, when he was the
20 chief technology officer at CIRRUS.

21 Up here -- I don't know if you can --
22 move it down just a little bit so I can read it there.
23 I asked him about it.

24 QUESTION: You see there at the top left,
25 it says 7/23?

1 ANSWER: Yes.

2 QUESTION: That reflects discussions you
3 personally had with Intel on July 23, 1997, correct?

4 ANSWER: Not discussions. I'm taking
5 notes.

6 QUESTION: Okay. But those notes reflect
7 somebody talking to you from Intel, correct?

8 ANSWER: Yes.

9 This is July 1977. He's the chief
10 technology officer at CIRBUS. And what is he learning
11 from Intel? Modular PC.

12 Can you pull that out again, Ryan?

13 But his deposition, there was no modular
14 PC.

15 QUESTION: When you said there was no
16 product, what did you mean?

17 ANSWER: I was not aware of such a
18 product.

19 Directly contradicted by his own
20 handwriting. This is a relevant fact when you're going
21 to measure credibility in this case.

22 You must not forget, further on
23 cross-examination, I said: Well, what about this
24 notebook here? This is a notebook that you created with
25 your handwritten notes while you were at CIRBUS.

1 Do you remember I showed him there was an
2 employment agreement he entered into when he was at
3 CIRRUS that said that he would have to return every
4 single thing when left the company.

5 The ideas he came up with at CIRRUS were
6 CIRRUS's ideas, and he couldn't take those with him.

7 Well, he took this (indicates), which
8 just coincidentally happens to have the idea for a
9 modular PC -- which he said he never came up with at
10 CIRRUS -- in it.

11 When I cross-examined him about it, I
12 said: Did you take this in violation of your employment
13 agreement, sir?

14 ANSWER: Yes.

15 Well, that's an important fact when
16 measuring credibility.

17 Is there really something new and unique
18 here? Is this something that Dr. Chu really came up
19 with on his own, or is this something that already was
20 out there that he heard about from Intel when he was at
21 CIRRUS?

22 And he decided to quit, and in three
23 weeks, wrote it off the top of his head and filed a
24 patent for it. We think the evidence shows the latter.

25 Now, you also heard about Dr. Chu's plans

1 when he got his multi-mode patent. In other words, the
2 patents at issue in this case, there's some earlier up
3 ones as well that aren't asserted that concern having
4 more than one module in a computer. That's what we mean
5 by multi-mode.

6 And he testified that in 2004, his plan
7 all the way back then was to proceed to litigation. He
8 wasn't making things. He wasn't planning on taking his
9 ideas and doing something useful. His plan from the
10 start, before he even got his patents, was to sue
11 people.

12 QUESTION: You had that plan in February
13 of 2004, yes?

14 ANSWER: Yes.

15 And he testified: And in connection with
16 collecting information from 2004 going onward, you
17 identified certain targets for licensing, right?
18 You remember he said one of those was my client, IBM,
19 all the way back in 2004.

20 QUESTION: And it targets in terms of
21 what companies are in the business?

22 ANSWER: Yes.

23 QUESTION: Well, so you were writing --
24 you were filing continuation patents and writing claims
25 that would cover certain aspects of what you saw

1 happening in the blade server industry; isn't that fair?

2 ANSWER: Yes.

3 What does this tell us? In 2004, he
4 filed these patents for these multi-modes, had no
5 intention of actually trying to build anything, and he
6 monitored the industry being developed by others, by IBM
7 making real products.

8 And his plan was to file continuation
9 patents as he's monitoring to try to get claims that
10 cover things people are already doing. Is that the kind
11 of activity that deserves being rewarded? We don't
12 think so.

13 Look at the timeline. Here's 2004. This
14 is when he testified that he's looking at the industry,
15 writing patents to try to cover the industry.
16 BladeCenter has been out since 2002.

17 Here's when he filed the application to
18 the three patents-in-issue in this case. Years after
19 BladeCenter's already been out. Those patents didn't
20 issue until 2008, over five years after IBM's already
21 been in the market. Yet he says it's his new unique
22 idea, and IBM should have to pay.

23 Now, let's talk -- let's switch subjects
24 and talk about the merits here.

25 And first, I'd like to address the issue

1 of whether these patents are valid or not.

2 IBM contends that the six asserted claims
3 are all invalid because they're anticipated by the folks
4 at Ketris, who did it first.

5 And then in addition, they would be
6 obvious in light of RLX, QuantumNet, and Hong being
7 combined to work together with Ketris.

8 Before we get into the element-by-element
9 analysis you saw Dr. McClure do, let's take a step back
10 and say: Well, what on earth is new or unique in these
11 patents that would justify getting a patent?

12 You need to have something new or unique?
13 You can't just do something that's already been done.

14 Well, let's look at what the Plaintiff
15 says is new and unique.

16 Dr. Chu on direct examination:

17 QUESTION: Can you tell us what your --
18 what the key invention described in this third white
19 paper, Plaintiff's Exhibit 23, is?

20 ANSWER: I was the first to invent using
21 serial PCI.

22 That's what he testified to on direct.
23 And that's, in fact, what you hear Counsel saying over
24 and over again: The invention is serial PCI.

25 Well, you remember when I showed Dr. Chu

1 on cross-examination that slide from his own expert,
2 Mr. Gafford, where Mr. Gafford says:

3 QUESTION: Others before Dr. Chu had
4 serialized PCI transactions, had they not?

5 Answer from ACQIS's own expert:

6 ANSWER: At least one reference that I
7 know of.

8 I showed Dr. Chu that in
9 cross-examination after he said he was the first. What
10 happens? He changed his testimony.

11 QUESTION: You didn't invent just plain
12 old serialized PCI transactions, did you?

13 ANSWER: Plain old serialized PCI
14 transactions, no.

15 So, again, you're measuring credibility
16 here.

17 On direct, he says he invented it. Once
18 I showed him that his own expert said he didn't, he
19 changed his testimony.

20 Mr. Gafford, their expert, as I said,
21 admits that Chu's invention cannot be serialized PCI
22 because Hong did it.

23 He says here: Which reference were you
24 referring to just a moment ago as having serialized PCI
25 transactions before Dr. Chu did?

1 ANSWER: One of the two references from
2 the inventor is named Hong.

3 So he admits that there's a piece of --
4 there's a prior art patent out there that already shows
5 what the Plaintiff says is his invention. And you've
6 seen it. Here it is. PCI. There it is. PCI to PCI
7 (indicates).

8 And there's the serialized right there.
9 This is PCI. PCI bus. This is parallel. It runs
10 through a serialized interface, just like in the figures
11 in the patent, to another PCI, parallel PCI (indicates).

12 That is indisputably serial PCI, and it's
13 indisputably done by somebody else. It's not new and
14 unique.

15 Mr. Gafford, on cross-examination --
16 excuse me. Let me back up.

17 On direct examination, Mr. Gafford said:
18 Well, the -- the Hong reference is not the same thing as
19 Dr. Chu's invention because the Hong reference is going
20 from a parallel PCI bus having a serial interface and
21 then going to another parallel serialized bus, right?
22 Parallel, serial to parallel. He says that's different
23 from Dr. Chu's patent on direct examination.

24 But then on cross-examination, I showed
25 him Figure 7 -- remember that, Members of the Jury --

1 from Dr. Chu's own patent. This is an example of the
2 claims.

3 And here you can see it says northbridge
4 primary PCI bus, secondary PCI bus, and it's got the
5 little squiggly line.

6 And I said: Okay. Now, this is an
7 example of the preferred embodiments of Dr. Chu's
8 invention, right?

9 ANSWER: Yes.

10 QUESTION: And the northbridge primary
11 PCI bus is a parallel bus, isn't it, sir?

12 ANSWER: Yes.

13 QUESTION: And the secondary --
14 That's this one here (indicates).

15 QUESTION: And the secondary PCI bus on
16 the bottom is a parallel bus, isn't it?

17 ANSWER: Yes.

18 QUESTION: And the serial bit is a little
19 squiggly line between those two; is that right?

20 ANSWER: That's right.

21 That's right there (indicates).

22 QUESTION: And that is in the prior art,
23 isn't it, sir?

24 ANSWER: It is.

25 So on cross-examination, again, we've got

1 a pattern here. Just like Dr. Chu, Dr. Gafford had to
2 change his tune.

3 On direct examination, he said: Hong is
4 different because it's parallel to serial to parallel,
5 but then he acknowledged that Chu's invention is the
6 same thing, parallel to serial to parallel.

7 Now, I might take a moment to address
8 something that Counsel said trying to distinguish
9 between what he called serial PCI and serial ethernet
10 connection.

11 He said: I is for internal and E,
12 ethernet, is for external, suggesting that the interface
13 in the patent is somehow internal, within this
14 northbridge stuff.

15 Well, that's not what the patent shows.
16 And you remember I crossed Mr. Gafford on this yesterday
17 afternoon.

18 This is the computing system in this box.
19 This is the peripheral system in this box. Where is the
20 little serial squiggly line? It's external to the
21 computing system, between the computing system and the
22 peripheral system.

23 It's exactly the same as Hong. They keep
24 trying to come up with different distinctions after we
25 bat down the ones they have. The fact of the matter is,

1 what they claim is new or unique in this patent is not.
2 It was done by others first.

3 And there's one other thing that is very
4 important to underline, and that is, this whole issue of
5 whether this patent requires a serial PCI interface has
6 been answered by the Judge.

7 Here's the phrase that Mr. Gafford points
8 to as being where in the claims the innovation is, but
9 the Judge has already construed peripheral component
10 interconnect bus transaction.

11 And you heard him say you have to use his
12 construction -- not the expert witness's construction,
13 but his construction as to all this means is a data
14 signal communication with an interconnected peripheral
15 component.

16 The Judge specifically said it is not
17 limited to a specific protocol like PCI. It can be
18 other protocols. All it needs to be is simply a data
19 signal communication. That's it. A serial data
20 communication. That's the rule. That's what the Judge
21 says.

22 So what's ironic here, Members of the
23 Jury, is that the thing that they're saying is the new
24 or unique invention, serial PCI, that was not new or
25 unique; it's not even claimed.

1 You don't have to use PCI to infringe
2 this, and you don't have to use PCI to invalidate this.
3 All you need is a data signal communication with an
4 interconnected peripheral component.

5 So their whole story of what they
6 invented is filled with holes.

7 I asked Mr. Gafford yesterday afternoon
8 about this, and he admitted that under the Court's claim
9 construction, it's not limited specifically to PCI. You
10 just need to look at the patent to see the Court's
11 construction is well-founded here.

12 Here you see -- here's the same Figure 7,
13 the serial interface. And the patent itself at Column
14 25, Lines 26 through 28 says: The present invention --
15 so it's talking about what the invention is.

16 The present invention overcomes the
17 aforementioned disadvantages of the prior art by
18 interfacing two PCI or PCI-like buses -- that's this and
19 this (indicates) -- by interfacing two PCI or PCI-like
20 buses using a non-PCI or non-PCI-like channel.

21 That's referring to this (indicates).
22 And it's calling it non-PCI. The Court construed it
23 that way. It's simply a data signal communication with
24 an interconnected peripheral component.

25 It's not even limited to serial PCI. It

1 could be ethernet; it could be USB. It could be
2 anything that's a serial data communication that's
3 interconnected between a computer and a peripheral.
4 That's not new or unique.

5 You heard from Mr. -- Dr. McClure, our
6 expert, that ethernet data met this limitation.

7 QUESTION: So is ethernet a data -- a
8 serial data signal communication that could be used with
9 an interconnected peripheral component?

10 ANSWER: It is.

11 Of course it is. So is universal serial
12 bus, which we talked about, which has serial right in
13 its name.

14 Now, Mr. Gafford, he followed me on this
15 on cross-examination yesterday afternoon, and he
16 testified that ethernet wouldn't fit -- wouldn't fit the
17 Court's construction.

18 But on cross-examination, while it was
19 difficult to get it, he basically admitted it.

20 QUESTION: People of ordinary skill
21 understand, when you're talking about peripheral devices
22 to a computer, you're talking about things like
23 printers, keyboards, mouses, screens, right?

24 ANSWER: Those are peripheral. They are
25 generally peripheral to an entire computer system, yes.

1 Okay. So he admits they're peripheral.

2 QUESTION: Okay. And so this little
3 squiggly line here is a serial data signal, correct?

4 ANSWER: Yes, it is.

5 Serial data signal, that's it. Admits
6 it.

7 QUESTION: And that serial data signal
8 permits the computer to communicate with the printer.

9 ANSWER: It does permit that, yes.
10 Serial data communication.

11 QUESTION: The printer here is
12 interconnected with the computer, right, sir?

13 ANSWER: It's interconnected.

14 So he admits it's a serial data signal.
15 This is an ethernet connection. They're saying it
16 doesn't meet this claim language. On cross-examination,
17 he admits, it's a serial data signal; it's in
18 communication; it's interconnected with a peripheral.

19 That's exactly what the claim language
20 is. Serial data signal communication with an
21 interconnected peripheral.

22 The claim language covers ethernet
23 connections, it covers USB connections, any kind of
24 serial interconnected -- connection.

25 Dr. Chu did not invent serial PCI.

1 You also heard from Counsel arguing and also on
2 cross-examination of some of our prior art witnesses,
3 some suggestion that maybe Dr. Chu's invention is PCI
4 Express.

5 Well, PCI Express -- you heard the
6 evidence -- is an industry standard developed by a
7 consortium of companies. It has nothing to do with
8 Dr. Chu.

9 So when they say: Well, this prior art
10 doesn't show PCI Express, that's a red herring. Who
11 cares? The patent doesn't even talk about PCI Express.
12 It's not part of the patent.

13 You also heard repeatedly from
14 Mr. Gafford and Counsel cross-examining witnesses and
15 arguing that somehow the prior art isn't invalidating
16 because it doesn't show PCI within a specific chip
17 called the northbridge chip.

18 But you saw on cross-examination, the
19 claims don't require a northbridge chip. Again, that's
20 a red herring. You need to weigh the evidence here
21 against these various witnesses and decide who is -- who
22 is more credible.

23 We've got dueling experts here. They're
24 talking about highly technical information, but I know
25 you, Members of the Jury, know how to assess credibility

1 because you do it in your everyday life.

2 Now, let's look at Mr. Gafford's
3 credibility.

4 I asked him yesterday afternoon: Have
5 your opinions been criticized by a judge in any
6 proceeding?

7 Asked him at his deposition, and he said:
8 Yes, on one occasion.

9 But on cross-examination, it turns out he
10 wasn't the telling the complete story to you, Members of
11 the Jury.

12 It turns out in the Relume Corp versus
13 Dialight Corp case, a judge -- a federal judge found Mr.
14 Gafford's conclusory assessment is without a reliable
15 factual foundation, and it ignores the voluminous
16 evidence of record.

17 Another case, second case, Sony case
18 versus Soundview, another, different federal judge found
19 Mr. Gafford's opinion is rejected as, quote, based on
20 flawed definitional premise.

21 Sound familiar? We have a flawed
22 definitional premise in this case, which is that
23 Mr. Chu -- or Dr. Chu invented serial PCI, which is that
24 the claims require specifically PCI, which is PCI
25 Express is part of the patent, which is northbridge is

1 somehow part of the patent.

2 Those are all flawed foundational
3 premises that he's offered to try to convince you of
4 something that's not true.

5 The Default Proof case, another federal
6 judge: Mr. Gafford's opinions are contradicted by the
7 intrinsic record.

8 On appeal in that case, the United States
9 Court of Appeals for the Federal Circuit, Gafford's
10 opinions were rejected because it was, quote, either
11 unsupported or contradicted by the express language of
12 the written description.

13 And then finally in a fifth instance,
14 another United States Court of Appeal Federal Circuit
15 case found Gafford's opinions were rejected because he
16 presented the jury with, quote, an incorrect yardstick
17 with which to measure the prior art, closed quote.

18 Now, you folks have to measure -- make
19 your own measurement; who's credible here and who's not.

20 So here we have admittedly -- on
21 cross-examination, Mr. Gafford admitted to this --
22 six -- five instances in which five separate courts have
23 found that his expert testimony on these patent issues
24 is rejected and unreliable.

25 Is that relevant to your assessment

1 today? Absolutely.

2 The fact is, the evidence shows that
3 Dr. Chu didn't invent anything new or unique, and he
4 certainly didn't invent serial PCI.

5 Now, let me go to the merits of our
6 argument on the Ketris prior art and walk through that
7 quickly.

8 We think the evidence has shown here in
9 this case that the Ketris system -- we think the
10 evidence has shown in this case that the Ketris system
11 anticipates every element of every asserted claim.

12 Remember, the Judge told you about
13 anticipation, and he said: Well, a patent -- a claim is
14 invalid if there's a prior art system out there that
15 practices every one of the elements.

16 Well, what does that mean? That's a
17 fancy way of saying somebody else did it first. Well,
18 here we think the evidence has conclusively shown that.

19 Now, let's start by talking about the
20 priority date. And what I put on the screen here is
21 simply the Court's instruction to you, Members of the
22 Jury, I believe the first time -- when we began today,
23 but the first time was on the 14th -- well, that date
24 is, obviously, wrong. It's probably February.

25 And he said the priority date for the

1 three patents in question is May 12th, 2000. So what
2 does that mean? That means this date here is what you
3 look at to see if somebody else did it first.

4 So if there's people who did it, who
5 practiced the invention before this time, then Chu's
6 patents aren't new or unique. So that's why it's called
7 the critical date or the priority date, the date you
8 guys use to assess whether something's prior art.

9 So we presented evidence from Mr. Jim
10 Medeiros as to the Ketris system. And these are
11 photographs of the actual physical system that you saw
12 over there.

13 We also presented extensive documentary
14 evidence and expert testimony showing that the Ketris
15 system started being worked on all the way back on
16 October 14th, 1998.

17 They wrote their own white paper in
18 November 1998. They had the engineering specifications
19 in May of '99. Product requirements were completed on
20 September 2, 1999.

21 The actual product, that product there
22 (indicates), was actually shipped to customers in April
23 of 2000. All of this happened before the priority date.

24 And you heard from Mr. Medeiros on this,
25 and you heard from Mr. McClure -- Dr. McClure, our

1 expert on this.

2 Did you hear anything, anything from
3 ACQIS challenging that this is prior art? Absolutely
4 not. Mr. Gafford presented rebuttal testimony yesterday
5 afternoon, didn't even mention any of this. It's not
6 contested. This system was done before Dr. Chu's
7 inventions.

8 So the only question then is: Does it
9 show each of the elements of the asserted claims?

10 So I don't have the board that I had
11 before of Claim 12. I'll just represent to you these
12 are the elements. We pulled them out. You've seen them
13 several times. And you heard Dr. McClure walk through
14 them, and I'll just walk through them as well.

15 The first element is: A console
16 comprising an ethernet hub controller.

17 Hold on just one second. Hey, Ryan, can
18 you try to set it up while I'm talking on the easel,
19 Claim 12?

20 So this is the first element. And
21 Dr. McClure showed you this little system has an
22 enclosure. It has connectors. It has ethernet hub
23 switches and slots (indicates).

24 This is the console. These are the hub
25 controllers right there. The coupling sites are back

1 here. It says a first coupling site, a second setup
2 coupling site. They're all back there (indicates).

3 Each slot comprising a connector and a
4 slot. The slot and connectors are back there. And the
5 console being an enclosure. Well, this is an enclosure.
6 So that element is plainly met.

7 The next element of the claims: A
8 plurality of computer modules each coupled to one of the
9 coupling sites through the connector and the slot.
10 There's a physical picture, the physical exhibit, which
11 is right over there (indicates).

12 And here is a -- a pull-out that
13 Dr. McClure testified to, DX47, in evidence, Page 2,
14 pulled out this picture. You can see right here, it
15 shows 16 server blades in the Ketris system. They're
16 each coupled to this backplane through coupling sites to
17 the connectors and the slots (indicates).

18 By the way, not disputed. This element
19 is not disputed either.

20 Then it talks about each of the
21 elements -- if you look over here -- each computer
22 module comprises a processing unit, main memory,
23 interface controller, and ethernet controller.

24 So the first one of those, a processing
25 unit. Here's a picture of the actual physical exhibit

1 over there of the blade server.

2 Dr. McClure and Mr. Medeiros both
3 testified that's where the processor is. Meets that
4 element.

5 They both testified that's where the main
6 memory is. Meets that element.

7 Interface controller, this is the element
8 that everyone is fighting about.

9 By the way, these two elements, not
10 disputed. Mr. Gafford and ACQIS don't dispute that the
11 prior art Ketris system shows those.

12 This is the only element they do dispute,
13 and this goes back to the serial PCI dispute. But as
14 you -- as I've shown you under the Court's construction,
15 that is met by any sort of serial connection.

16 Well, Mr. Medeiros testified about how
17 the system works. He says it takes a parallel PCI
18 bus -- excuse me -- quote, it takes a parallel bus PCI;
19 it serializes it into different signal -- differential
20 signaling, sends it across the backplane, then another
21 server would take the serial information in, and then
22 back convert it into a PCI bus that would be running on
23 that server blade.

24 Serial or parallel PCI, serialized
25 parallel PCI. Look familiar? It's exactly what the

1 pictures in the patent disclosed as being the preferred
2 embodiment of the invention, but it was done before the
3 invention. It was done in the Ketris system.

4 So this element is met.

5 Wherein each of the computer modules
6 operates fully independent of the other. Documents show
7 this element is met. Dr. McClure presented evidence of
8 it. Mr. Gafford, in rebuttal, did not dispute it.

9 The last element, the computer system of
10 Claim 11: Wherein the differential signal channel
11 comprises two sets of unidirectional serial bit channels
12 which transmit data in opposite directions.

13 Mr. Medeiros testified, the basic
14 fundamental is a differential signal that you
15 communicate. So there's a pair for one direction, and
16 then there's a pair for the other direction. Exactly
17 what this claim element is talking about.

18 So this element is also plainly met.
19 It's not even really seriously disputed.

20 Now, that is every element, Members of
21 the Jury, of Claim 12. There is no dispute that every
22 single element of this claim has been met by the Ketris
23 system. That is, by definition, anticipation. That
24 renders the patents invalid.

25 Now, the other claims are almost

1 identical to Claim 12, but you saw there's a few
2 differences. One was, some of the elements had the
3 addition of a graphics controller.

4 Well, Dr. McClure and Mr. Medeiros both
5 showed you that's where the graphics controller is in
6 the Ketris system. So that element's already in the
7 prior art system.

8 Another element that's covered by the
9 claims is a mass storage device coupled to the
10 processing unit.

11 Well, again, Dr. McClure and Mr. Medeiros
12 both showed you this is where it is physically. On the
13 physical exhibit, you have to look at it. That's a hard
14 drive. A hard drive is a mass storage device.
15 So that element is met as well.

16 Another element that's in some of the
17 claims is that one of the computer modules can replace
18 another one in operation.

19 Again, Mr. Medeiros and Dr. McClure
20 showed that this element is met as well. This is just
21 an example of that from DX52 in evidence, a Ketris
22 document from before Dr. Chu's invention.

23 In the event of a failure of an active
24 manager, another server is automatically elected as the
25 active manager, providing the continuous management of

1 the chassis and remaining servers.

2 Replaces another one in operation, right
3 there in the document.

4 The second to last element that's in some
5 of the claims is: A console comprising a power supply
6 and a serial communication hub controller powered by the
7 power supply.

8 Again, Dr. McClure and Mr. Medeiros
9 showed you, here's the power supply. It's in the
10 system. Has to be in the system. And the serial hub
11 controllers that are powered by that power supply. So
12 they're all there in the prior art system.

13 And then the final element that's in some
14 of the claims but not others is circuitry that can vary
15 clock frequency of the processing unit for various power
16 consumption.

17 You saw the documents that showed that
18 the Ketris system used a Pentium III processor. And as
19 Dr. McClure testified, anyone of skill in the art would
20 know that this processor had the capability of changing
21 clock frequency for the purposes of lowering power
22 consumption.

23 Not disputed. Not disputed by
24 Mr. Gafford.

25 So, Members of the Jury, I have just gone

1 through every element of all six asserted claims.

2 You've just seen with your own eyes in
3 these slides, and you can recall from the testimony,
4 that every one of these elements is in the Ketris
5 system.

6 That's really important. That shows you
7 that somebody else did it first, every one of the
8 elements. And please, remember the Ketris system was
9 not before the Patent Examiner when these patents were
10 filed. The Patent Examiner didn't know anything about
11 it.

12 You ask: Well, how could these patents
13 get issued? Well, he didn't know.

14 If this system had been presented to the
15 Patent Examiner, the Patent Examiner could see, like
16 you've seen Mr. Medeiros go through and show how the
17 system works.

18 Do you think the Patent Office would have
19 said: Well, you've got a valid patent on each and every
20 element that's already in a single system? No, it would
21 not. It would not.

22 So for this reason alone, we believe that
23 we have shown that the asserted claims here are not
24 valid; they're not new; they're not unique. And if you
25 don't have a new or unique patent, you can't get money

1 for it. It's invalid.

2 Now, we also went through and showed you
3 the RLX blade server system. And I'm not going to take
4 as much time, but you heard from Mr. Irving on the RLX
5 system.

6 This, again, was a prior art system. We
7 showed you the evidence that showed it was conceived in
8 January of 2000; that they had engineering documents
9 developed in January 28th; that they had their
10 engineering design down April 19th, 2000, all done
11 before the priority date.

12 Mr. Gafford did not dispute any of that.
13 It's undisputed. It is prior art.

14 Again, I'm not going to take the time
15 that I did with Ketris, but you saw, going through each
16 and every element, that it's met. Just like Ketris,
17 it's got an enclosure. It's got slots. It's got
18 multiple blade servers.

19 It's got an ethernet hub controller.
20 It's got coupling sites, the modular coupled to the
21 coupling sites through the connector, just like in the
22 claims.

23 It's got a processor. It's got a main
24 memory. It's got an interface controller that's coupled
25 to a differential channel signal.

1 You heard Mr. Irving testify extensively
2 about how, just like in Figure 7 of the patent, the
3 system went from parallel PCI into a serial bus, back
4 into parallel PCI, just like Figure 7. Exact same
5 thing.

6 You saw the evidence that the elements
7 operate independently of each other and that the channel
8 comprises unidirectional serial bit channels, the same
9 evidence there. It shows both of those things.

10 The graphics controller on it was shown.
11 The mass storage element was shown. The processor
12 element for varying clock frequency was shown. The
13 replaceability was shown. Any blade server set up as an
14 installation server can be used to re-image any other
15 server blade in any chassis on the management network.
16 The power supply was shown.

17 So every element is also shown here and
18 in QuantumNet. Again, even an earlier blade server
19 system had the slots and the connectors and multiple
20 blades, was independently testified to, was done well
21 before May 12th, undisputed, not challenged by
22 Mr. Gafford.

23 Similar system of computer modules,
24 slots, connectors, console, ethernet hub controller.

25 All of these different systems we

1 maintain, in addition to Ketris anticipating these
2 claims, that it would simply be obvious for a person of
3 ordinary skill in the art, as of the date, the priority
4 date, when all this stuff had already been done, to do
5 what it is that Mr. Chu claims is his invention.

6 And we believe the evidence will show
7 that and that you'll conclude that. There's really no
8 question here.

9 Now, let me switch subjects to
10 non-infringement. Our second defense is
11 non-infringement.

12 Now, you'll recall in my opening
13 statement and my cross-examination of Mr. Gafford on
14 infringement, we focused on this element here: Wherein
15 each of the computer modules operates fully independent
16 of each other. This requirement of independent
17 operation is in each of the asserted claims.

18 The Court has construed the phrase
19 computer module as an assembly for providing a computing
20 function within computer system as recited in a
21 particular claim.

22 So this is an element. As the Court has
23 instructed you, for any given claim, it is the
24 Plaintiff's burden to prove to prove that every element
25 has been met. This is an element that they haven't

1 proved that they've been met.

2 If you look at the accused system,
3 they've got blade servers, and they've got a management
4 module.

5 Now, you heard Counsel pull out some
6 nitpick testimony from Mr. Holland about independent
7 operation. Well, he didn't tell you that those
8 questions were just focused on these guys, the blade
9 servers, okay?

10 Conspicuously absent from those questions
11 is another computer module in the IBM system. Mr.
12 Gafford admitted the management module is a computer
13 module. Under the Court's construction, there's no
14 question it's a computer module.

15 Well, the undisputed evidence shows,
16 Members of the Jury, that the management module is not
17 independent to blade servers.

18 Now, the claim language here is, you've
19 got a plurality of computer modules that are coupled to
20 these coupling sites. Well, the blade server is coupled
21 with the coupling sites on the other side.

22 And it says you've got this plurality and
23 each of the computer modules in that plurality, each of
24 them, have to operate fully independent of each other.

25 This is one of them, but it's undisputed

1 it does not operate fully independent. This is
2 responsible for initializing these blades. This module
3 isn't doing it. These blades don't work.

4 This element here, chassis-level power
5 management, that's done by the management computer, the
6 computer module called the management module. If
7 that -- the management module isn't working in doing
8 this, these other computer modules don't work.

9 Now, you -- they showed you testimony
10 from Mr. Holland. He was talking about just blade
11 servers and not the management module. But when asked
12 about the management module, what did he say?

13 QUESTION: And would you say that each of
14 the blade servers then is dependent upon the management
15 module?

16 ANSWER: Yes. The most critical element
17 in maintaining the chassis viability is the management
18 module be able to control all of these factors.

19 QUESTION: And also that the operation of
20 any one server blade within the chassis can impact the
21 operation of any other blade server -- any other server
22 blade?

23 ANSWER: Yes.

24 So actually, when asked about the
25 management module, which is a computer module,

1 Mr. Holland said there's a dependency. They are not
2 independent.

3 But it's not just Mr. Holland.

4 Mr. Gafford, on cross-examination, admitted the same
5 thing.

6 QUESTION: And these blade server
7 computers are dependent, at least to a certain extent,
8 on this management module computer, correct, sir?

9 ANSWER: Yes.

10 Their own expert admits that there's a
11 dependency between the computer module called the
12 management module and the computer module called the
13 blade server. That means there's non-infringement.

14 This element: Wherein each of the
15 computer modules operates fully independent of each
16 other is not met.

17 Mr. Gafford has the burden -- ACQIS and
18 Mr. Gafford, their expert, have the burden of proof to
19 show you through evidence that this element is met, and
20 they can't do so.

21 You'll remember Mr. Gafford doesn't even
22 accuse any software. He just accuses an empty piece of
23 hardware. And he says: That empty piece of hardware
24 with no software running on it shows that these modules
25 are operated independent of each other.

1 It's nonsensical. They don't even
2 operate if they don't have software on them. You can
3 put software on them to make them work as a team,
4 virtualization software. You remember on
5 cross-examination, he freely admitted that.

6 THE COURT: Counsel, you have about 10
7 minutes left.

8 MR. VERHOEVEN: Thank you, Your Honor.

9 You know, if he wanted to prove this, he
10 would have to show you that IBM is selling software that
11 causes the -- all of these different modules to work
12 independently.

13 He can't just point to a piece of
14 hardware and say: Oh, it operates independently. Take
15 my word for it.

16 It's their burden of proof, and they
17 haven't shown you that the software operates, whether
18 these modules even operate, much less operate
19 independently.

20 If they wanted to prove that to you, they
21 should have done a demonstration and used IBM's software
22 on there and showed you how it works independently. Not
23 just stood on the stand, when they have the burden of
24 proof, and point to the element and say: Well, it's met
25 based on this deposition testimony you saw played for

1 two-and-a-half hours in the morning.

2 That's what he testified to. Does that
3 meet his burden of proof?

4 This is serious business. They're asking
5 for tens of millions of dollars, and they haven't even
6 tried to show that this element is met. In fact,
7 they've admitted that it's not on cross-examination.

8 This element is in every single one --
9 this independent operation requirement is in every
10 single one of the claims, Members of the Jury. If you
11 find that they didn't meet their burden of proof on this
12 element, you must, under the Court's construction, find
13 non-infringement. And we think you should, and that's
14 another defense to the case.

15 Now, let me use my remaining time, if I
16 could, to talk a little bit about ACQIS's claim for
17 damages.

18 Now, as I told you in my opening
19 statement, we think damages in this case should be zero.
20 IBM does not infringe these patents, and these patents
21 are not valid.

22 But just in case you disagree with me and
23 the evidence we presented, I must address their damages
24 claim because I won't have an opportunity to do it
25 later.

1 But just because I'm addressing their
2 damages claim, Members of the Jury, please do not infer
3 that I somehow implicitly think that we're liable. We
4 are not. It's just the way the situation works.

5 As the Court instructed you, you
6 shouldn't draw any inferences from when the Court talks
7 about damages rules, and you shouldn't draw any
8 inferences by me, too. We dispute liability and think
9 damages should be zero.

10 But let's look at the evidence that the
11 Plaintiff has, briefly. In the opening statement, you
12 heard from Counsel: IBM charges a royalty rate of 1
13 percent per patent when it charges others -- when
14 someone else uses one of their patents.

15 Remember hearing that?

16 We're only asking for what they asked
17 for. That's all we're asking.

18 That was their pitch in the opening
19 statement. But what did the evidence show?

20 Well, we presented an IBMer who's been in
21 charge of licensing for over 10 years, and she was
22 asked -- this is Ms. Baumgartner.

23 QUESTION: In the past 10 years, have you
24 ever seen IBM pay as high as 1 percent per patent for a
25 license to patent in the computer sector?

1 ANSWER: No.

2 So the evidence doesn't support what
3 Counsel told you in the opening statement.

4 You heard from Mr. Murtha on direct
5 examination.

6 QUESTION: How did Factor 1 come into
7 your analysis?

8 Factor 1 is the first of the
9 Georgia-Pacific Factors that deals with whether there's
10 an established royalty rate.

11 QUESTION: How did Factor 1 come into
12 your analysis?

13 ANSWER: Well, this is a critical factor,
14 because, in fact, ACQIS has granted, up till today, 10
15 licenses to the patents in question.

16 So on direct, he says it's a critical
17 fact, these licenses, these litigation licenses that
18 he's referring to.

19 He further said: Now, I think it's been
20 raised several times that these licenses were all part
21 of litigation settlements. Is that your understanding?

22 He answered yes.

23 QUESTION: And how does that impact your
24 opinion?

25 He said: In a very positive way.

1 So on direct, he says: I'm relying on
2 these litigation licenses, and the fact that they're
3 part of litigation impacts me in a positive way.

4 Well, what did he say on cross?

5 Again, this is the positive way, quote,
6 on direct. On cross, I showed him what he said in
7 another case just a little while ago, and he took the
8 exact opposite direction.

9 QUESTION: What is the significance of
10 entering into an agreement under a threat of litigation?

11 ANSWER: You're not really focused on the
12 value of the patent but possibly on the cost of the
13 lawsuit. It's not an arm's-length transaction.

14 So he admits on cross-examination that
15 none of those agreements are reliable for the purpose of
16 determining a reasonable royalty.

17 And again, on direct, he said they were
18 critical. On cross, he said: Excuse me. If you're
19 referring to the 10 agreements we were talking about
20 during my direct examination, those ones I did not rely
21 on.

22 Again, you have to assess credibility
23 here.

24 On direct, they're critical. The fact of
25 the litigation is positive. I show him his inconsistent

1 position in the LaserDynamics case, and he admits
2 they're not reliable and changes his position and says:
3 I don't even rely on them.

4 Your Honor, if you could let me know when
5 I have a couple of minutes, so I --

6 THE COURT: Yes. You have about four
7 minutes left.

8 MR. VERHOEVEN: Thank you.

9 ACQIS -- he then said on redirect,
10 Members of the Jury, said: Okay. Okay. I didn't rely
11 on them. I just looked at them as a, quote, sanity
12 test.

13 If my royalty rate was so far away from
14 what ACQIS actually was doing currently, then as a
15 sanity test, I would mean -- it would mean I was
16 probably wrong.

17 Okay. What we put on this chart, Members
18 of the Jury, are the agreements. He said ten but, in
19 fact, he only relied on one, two, three, four, five,
20 six; and those are the six agreements that he had on his
21 chart that had those implied royalty rates to see
22 whether 3 percent made sense or not.

23 But when you look at how much is actually
24 paid on those agreements that he said was a sanity
25 check, you see that what he's asking for for IBM is over

1 86 times higher than was paid to any of these
2 agreements, by the way, which were all lump-sum
3 agreements that he was relying on for a sanity test.

4 What does this tell us? He was probably
5 wrong, just like he admitted.

6 The other agreement that they rely on
7 extensively is the HP agreement. It was a settlement
8 for a lot of money, \$30 million.

9 But you heard from Mr. Ratliff that if
10 you -- if you adjust that using the same math to IBM
11 sales time period and market share, what do you get?

12 For the time period, it's reduced to 5.6
13 million, and when you adjust it for sales and market
14 share, 2.4 million. The exact same math used for the
15 litigation agreement for HP when adjusted for IBM's
16 market share and time period equals \$2.4 million, not
17 \$27 million.

18 So it's all smoke and mirrors.

19 Finally, let's look at what IBM actually
20 had to say. IBM said: In my experience, the ones I've
21 personally been involved with, we have paid between 1
22 and \$4 million. That's 10 years of experience
23 Ms. Baumgartner had. But she also testified that the
24 definition of a licensed patent includes all
25 continuations.

1 So what does the evidence show here? It
2 shows there's no way IBM would ever, in a hypothetical
3 negotiation, have paid that much money. If anything,
4 Mr. Ratliff's number, 3.5 million, if you find
5 liability, is generous. Most likely, a reasonable
6 royalty would be much less.

7 So let me conclude, Members of the Jury,
8 by again thanking you for your service. I know you're
9 all going to carefully look at the evidence and form
10 your own independent judgments.

11 We believe the evidence has shown here
12 that there is no liability; that somebody else did these
13 patents first. If the Patent Office had known about it,
14 the Patent Office wouldn't have issued these patents.

15 I believe the evidence also shows there's
16 no infringement. And so when you go fill out these
17 verdict forms, we hope that you'll so find.

18 Thank you for your time.

19 THE COURT: Thank you, Counsel.

20 MR. GUSKE: Your Honor, may I split my
21 last 20 minutes with Mr. Chandler?

22 THE COURT: Yes, you may.

23 Now, the claim language here is, you've
24 got a plurality of computer modules that are coupled to
25 these coupling sites. Well, the blade server is coupled

1 with the coupling sites on the other side.

2 And it says you've got this plurality and
3 each of the computer modules in that plurality, each of
4 them, have to operate fully independent of each other.

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7 responsible for initializing these blades. This module
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17 about the management module, what did he say?

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19 the blade servers then is dependent upon the management
20 module?

21 ANSWER: Yes. The most critical element
22 in maintaining the chassis viability is the management
23 module be able to control all of these factors.

24 QUESTION: And also that the operation of
25 any one server blade within the chassis can impact the

1 operation of any other blade server -- any other server
2 blade?

3 ANSWER: Yes.

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5 management module, which is a computer module,
6 Mr. Holland said there's a dependency. They are not
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23 these modules even operate, much less operate
24 independently.

25 If they wanted to prove that to you, they

1 should have done a demonstration and used IBM's software
2 on there and showed you how it works independently. Not
3 just stood on the stand, when they have the burden of
4 proof, and point to the element and say: Well, it's met
5 based on this deposition testimony you saw played for
6 two-and-a-half hours in the morning.

7 That's what he testified to. Does that
8 meet his burden of proof?

9 This is serious business. They're asking
10 for tens of millions of dollars, and they haven't even
11 tried to show that this element is met. In fact,
12 they've admitted that it's not on cross-examination.

13 This element is in every single one --
14 this independent operation requirement is in every
15 single one of the claims, Members of the Jury. If you
16 find that they didn't meet their burden of proof on this
17 element, you must, under the Court's construction, find
18 non-infringement. And we think you should, and that's
19 another defense to the case.

20 Now, let me use my remaining time, if I
21 could, to talk a little bit about ACQIS's claim for
22 damages.

23 Now, as I told you in my opening
24 statement, we think damages in this case should be zero.
25 IBM does not infringe these patents, and these patents

1 are not valid.

2 But just in case you disagree with me and
3 the evidence we presented, I must address their damages
4 claim because I won't have an opportunity to do it
5 later.

6 But just because I'm addressing their
7 damages claim, Members of the Jury, please do not infer
8 that I somehow implicitly think that we're liable. We
9 are not. It's just the way the situation works.

10 As the Court instructed you, you
11 shouldn't draw any inferences from when the Court talks
12 about damages rules, and you shouldn't draw any
13 inferences by me, too. We dispute liability and think
14 damages should be zero.

15 But let's look at the evidence that the
16 Plaintiff has, briefly. In the opening statement, you
17 heard from Counsel: IBM charges a royalty rate of 1
18 percent per patent when it charges others -- when
19 someone else uses one of their patents.

20 Remember hearing that?

21 We're only asking for what they asked
22 for. That's all we're asking.

23 That was their pitch in the opening
24 statement. But what did the evidence show?

25 Well, we presented an IBMer who's been in

1 charge of licensing for over 10 years, and she was
2 asked -- this is Ms. Baumgartner.

3 QUESTION: In the past 10 years, have you
4 ever seen IBM pay as high as 1 percent per patent for a
5 license to patent in the computer sector?

6 ANSWER: No.

7 So the evidence doesn't support what
8 Counsel told you in the opening statement.

9 You heard from Mr. Murtha on direct
10 examination.

11 QUESTION: How did Factor 1 come into
12 your analysis?

13 Factor 1 is the first of the
14 Georgia-Pacific Factors that deals with whether there's
15 an established royalty rate.

16 QUESTION: How did Factor 1 come into
17 your analysis?

18 ANSWER: Well, this is a critical factor,
19 because, in fact, ACQIS has granted, up till today, 10
20 licenses to the patents in question.

21 So on direct, he says it's a critical
22 fact, these licenses, these litigation licenses that
23 he's referring to.

24 He further said: Now, I think it's been
25 raised several times that these licenses were all part

1 of litigation settlements. Is that your understanding?

2 He answered yes.

3 QUESTION: And how does that impact your
4 opinion?

5 He said: In a very positive way.

6 So on direct, he says: I'm relying on
7 these litigation licenses, and the fact that they're
8 part of litigation impacts me in a positive way.

9 Well, what did he say on cross?

10 Again, this is the positive way, quote,
11 on direct. On cross, I showed him what he said in
12 another case just a little while ago, and he took the
13 exact opposite direction.

14 QUESTION: What is the significance of
15 entering into an agreement under a threat of litigation?

16 ANSWER: You're not really focused on the
17 value of the patent but possibly on the cost of the
18 lawsuit. It's not an arm's-length transaction.

19 So he admits on cross-examination that
20 none of those agreements are reliable for the purpose of
21 determining a reasonable royalty.

22 And again, on direct, he said they were
23 critical. On cross, he said: Excuse me. If you're
24 referring to the 10 agreements we were talking about
25 during my direct examination, those ones I did not rely

1 on.

2 Again, you have to assess credibility
3 here.

4 On direct, they're critical. The fact of
5 the litigation is positive. I show him his inconsistent
6 position in the LaserDynamics case, and he admits
7 they're not reliable and changes his position and says:
8 I don't even rely on them.

9 Your Honor, if you could let me know when
10 I have a couple of minutes, so I --

11 THE COURT: Yes. You have about four
12 minutes left.

13 MR. VERHOEVEN: Thank you.

14 ACQIS -- he then said on redirect,
15 Members of the Jury, said: Okay. Okay. I didn't rely
16 on them. I just looked at them as a, quote, sanity
17 test.

18 If my royalty rate was so far away from
19 what ACQIS actually was doing currently, then as a
20 sanity test, I would mean -- it would mean I was
21 probably wrong.

22 Okay. What we put on this chart, Members
23 of the Jury, are the agreements. He said ten but, in
24 fact, he only relied on one, two, three, four, five,
25 six; and those are the six agreements that he had on his

1 chart that had those implied royalty rates to see
2 whether 3 percent made sense or not.

3 But when you look at how much is actually
4 paid on those agreements that he said was a sanity
5 check, you see that what he's asking for for IBM is over
6 86 times higher than was paid to any of these
7 agreements, by the way, which were all lump-sum
8 agreements that he was relying on for a sanity test.

9 What does this tell us? He was probably
10 wrong, just like he admitted.

11 The other agreement that they rely on
12 extensively is the HP agreement. It was a settlement
13 for a lot of money, \$30 million.

14 But you heard from Mr. Ratliff that if
15 you -- if you adjust that using the same math to IBM
16 sales time period and market share, what do you get?

17 For the time period, it's reduced to 5.6
18 million, and when you adjust it for sales and market
19 share, 2.4 million. The exact same math used for the
20 litigation agreement for HP when adjusted for IBM's
21 market share and time period equals \$2.4 million, not
22 \$27 million.

23 So it's all smoke and mirrors.

24 Finally, let's look at what IBM actually
25 had to say. IBM said: In my experience, the ones I've

1 personally been involved with, we have paid between 1
2 and \$4 million. That's 10 years of experience
3 Ms. Baumgartner had. But she also testified that the
4 definition of a licensed patent includes all
5 continuations.

6 So what does the evidence show here? It
7 shows there's no way IBM would ever, in a hypothetical
8 negotiation, have paid that much money. If anything,
9 Mr. Ratliff's number, 3.5 million, if you find
10 liability, is generous. Most likely, a reasonable
11 royalty would be much less.

12 So let me conclude, Members of the Jury,
13 by again thanking you for your service. I know you're
14 all going to carefully look at the evidence and form
15 your own independent judgments.

16 We believe the evidence has shown here
17 that there is no liability; that somebody else did these
18 patents first. If the Patent Office had known about it,
19 the Patent Office wouldn't have issued these patents.

20 I believe the evidence also shows there's
21 no infringement. And so when you go fill out these
22 verdict forms, we hope that you'll so find.

23 Thank you for your time.

24 THE COURT: Thank you, Counsel.

25 MR. GUSKE: Your Honor, may I split my

1 last 20 minutes with Mr. Chandler?

2 THE COURT: Yes, you may.

3 MR. STACY: With the Court's permission?

4 THE COURT: You may proceed.

5 MR. STACY: I just learned an important
6 lesson: When you go up against IBM, it's going to be
7 painful. I feel like I've been spending the last three
8 weeks of my life with a prison rodeo team.

9 All we did for the first 20 minutes was
10 attack character, attack -- personal attacks. But let's
11 look at the evidence behind a few of his attacks.

12 I counted six times that IBM said: It's
13 three weeks. Do you remember that? Three weeks. It's
14 not fair to compensate Dr. Chu for three weeks of work.
15 I've been doing the math. I can't figure out how he got
16 three weeks.

17 Dr. Chu left his first employment,
18 according to IBM, December 5th, 1997, and he filed his
19 patents on May 12th, 2000. Not three weeks, no matter
20 how you do the math. It's character assassination.

21 They're trying to betray Dr. Chu's
22 invention as irrelevant, because there were three weeks.
23 No. Complete -- completely made up.

24 Pulled up -- let's see -- pulled
25 Page 5 -- he pulled up Slide 5 out of the patent. What

1 a wonderful story. Said, well, this is a cable right
2 here. It connects things together. It's just like
3 Hong.

4 Folks, this is one computer chip.
5 Northbridge, southbridge. Remember that? Hong was
6 about connecting something to a back room. This
7 (indicates) this cable.

8 That (indicates) is a computer chip.
9 Those are the real facts.

10 Pull up Slide 25, please.

11 If you'll look at 25, or this slide, this
12 was an IBM slide. I threw down the challenge as cleanly
13 and as clearly as I could, and IBM just refused to admit
14 it.

15 What we talked about is this language:
16 Interface controller and an ethernet controller. We've
17 talked about both of those. Now, when IBM came up here,
18 they talked about it and said, oh, let's look over here.

19 Don't look over here. Look over here.
20 Look over here.

21 Why did they ignore the challenge I gave
22 them?

23 Ethernet controller and interface
24 controller are different things. But Mr. Verhoeven
25 didn't want to talk about that difference.

1 The reality is, their entire invalidity
2 case is based on converting that language into that
3 language, pointing to two of the same things. That's
4 their entire case.

5 And I'll go back to what I said before.
6 Two ethernet controllers are exactly that, two ethernet
7 controllers. Nothing more. There is no interface
8 controller on this board.

9 Remember, I, interface, internal;
10 ethernet, E, external. You didn't hear any challenge on
11 that.

12 The only thing that IBM challenges is a
13 little bit of language down here (indicates), but that
14 doesn't change anything in the Court's construction.

15 The Court construed this term, but left
16 interface controller there.

17 IBM is doing an incredible violence to
18 these claims by just trying to read things out of them,
19 but that's the only way their invalidity case works.

20 Go to Slide 34.

21 They brought up their position again on
22 independent. I think he called it nit-pick testimony.
23 Pretty clear. Absolutely clear.

24 Remember the two blades, the big things?
25 Those are absolutely independent. I addressed Mr.

1 Verhoeven's point about the management modules in the
2 next set of testimony, but we know first that the blades
3 are absolutely independent. It's not nit-pick testimony
4 that is an admission under cross-examination.

5 And then what did Mr. Holland confirm for
6 us? He confirmed that management module, the thing that
7 goes in the back of the computer rather than in the
8 front of the computer, not the same thing. It doesn't
9 meet the computer module definition. It doesn't have
10 that serial PCI limitation.

11 You never heard IBM say Mr. Stacy's off
12 his rocker. We've got that in testimony right here. He
13 never brought anything to you to show that.

14 What's on the record is this by the man
15 that knows. Computer modules are the blades, the big
16 things that go in front, not those management modules
17 that go in the back.

18 Slide 80. Thank you.

19 Back on Mr. Murtha. Brings up a couple
20 of things, well, IBM would never pay this. Sometimes
21 maybe it's good to be the king where you can force your
22 will on others. But the reality is, this is a
23 hypothetical negotiation. IBM doesn't get to dictate
24 what it's going to do just because it's big. It has to
25 sit at the table and behave reasonably.

1 And this, those 15 Georgia-Pacific
2 Factors, the Court has set those out to tell you what's
3 reasonable and how people would behave.

4 What Mr. Murtha did is go through all
5 those factors and looked at all the different data
6 points. IBM, again, I laid down the challenge. Why are
7 you just talking about HP? Why are you going to show
8 that silly graph with the big thing on the end?

9 And they brought it up with no
10 explanation. They didn't show Oracle, Dell, SuperMicro.
11 They didn't put them up there, even though I issued the
12 challenge.

13 So it comes down to this. It comes back
14 to two experts in their field doing their jobs,
15 analyzing the data, analyzing 3 million records, going
16 through all of the different factors that the courts
17 have laid out. They came to this conclusion.

18 And what IBM left with is if we lose, if
19 we do infringe, if the patents are valid, we'll give
20 Dr. Chu 3-1/2 million dollars, because we're generous.

21 What IBM is really saying is we want to
22 pay less than everybody else out there. It's not
23 generous. What they are looking for is a better deal
24 than everybody else. They want a competitive leg up on
25 everybody else, because they get to use Dr. Chu's

1 technology for less. That's not fair. That's not
2 reasonable.

3 At the end of the day, it's not about
4 character assassination. It's about what's fair,
5 reasonable, and right.

6 IBM is using Dr. Chu's technology. Those
7 patents are not invalid. And a fair and reasonable
8 royalty is 3 percent. And when you apply that to the
9 sales of IBM, it comes out to be this number
10 (indicates). That's just the math. That's fair and
11 that's reasonable.

12 With that, I would like to give the rest
13 of my time to my mentor and friend, Mr. Chandler.

14 THE COURT: Thank you, Counsel.

15 MR. CHANDLER: Your Honor, if it pleases
16 the Court.

17 And, Ladies and Gentlemen of the Jury, I
18 want to first, in making my closing comments, thank the
19 Cooley Firm for giving me the opportunity as an old
20 country lawyer in being involved in the trial of a
21 patent case. This now makes my -- all the kind of cases
22 I've tried virtually complete.

23 And it was a grand experience. I've
24 never been around a more dedicated, harder-working, and
25 brilliant group of people, both sides. Those that held

1 the spark of conflict and came against us, bright,
2 brilliant people that work hard and cared.

3 And IBM, they got awful good lawyers, but
4 they sure need them in this case.

5 But most particularly, I want to thank
6 Bill Chu for allowing me to be part of your trial team,
7 Bill.

8 I made a statement in opening statement
9 that I really believe that Bill Chu in the years I've
10 gotten to know him is probably the finest and most
11 decent client I've ever represented. I will repeat that
12 now; and after having lived the better part of 75 years,
13 as I told you, it may be my last time to be up before a
14 jury, certainly in federal court.

15 But I cherish these times and this great,
16 great responsibility that I've been part of.

17 Now, Mr. Verhoeven told the jury on
18 opening statement, told you that -- and if you would
19 pull up Page 61 -- something along the lines of:

20 Throughout the last century, IBM has been
21 a major innovator in technology in the United States of
22 America, and it really has been quite responsible for
23 the development of American business and American
24 superiority in business over other countries in the
25 world.

1 No, Mr. Verhoeven. IBM is not really
2 responsible for the development of American business and
3 American superiority in business, but it's individual
4 Americans and the men and women that make up America
5 that have contributed to this great nation that have
6 made the superiority of American business; not IBM.

7 I know this, because I've spent virtually
8 50 years doing nothing but representing people against
9 big companies. And there's no one more miraculous, more
10 creative with more credibility than an American working
11 person.

12 I mentioned Bill Chu, and, Bill, when
13 you -- let me remind you of a little something about
14 Bill Chu, and you heard his testimony. We'll have the
15 picture there. That's Bill in Shanghai, China, before
16 they had to flee from Mao Tsu-Tung to Hong Kong.

17 That's Bill getting his doctorate, and
18 virtually six-and-a-half years of engineering school.

19 And as I sat there and listened to his
20 testimony, I was so terribly impressed. At the same
21 time, I remember as a young lawyer, those days in the
22 late 1960s were a dark day in American history. There
23 was great rebellion and great strife in America. Flags
24 were being burned on that campus at Berkeley.

25 It was -- it was mayhem, and at the same

1 time, there was a young Chinese lad that spent his time,
2 as others were enjoying indecencies, going about doing
3 some things that his heart must swell on today. While
4 things were going on out there, he was cleaning toilets
5 and cleaning up their dormitories so that he might earn
6 the money to go to college.

7 And I -- I'm totally amazed by here's a
8 young man that came over with nothing but the hopes and
9 the dreams and a suitcase. He is the type of American
10 that I think they had in mind when they wrote the
11 Constitution and would have been very proud, if James
12 Madison had been in this courtroom or Thomas Jefferson,
13 to see a Bill Chu.

14 And I would just simply tell IBM, America
15 was made not by you, IBM, but America made IBM, American
16 people did.

17 I'm reminded of a little book that's one
18 of my favorites and written by a person down in Wharton,
19 Texas, and a great little book called To Kill a
20 Mockingbird. And in the defense of old Tom, a lawyer
21 named Atticus Finch, an old country lawyer, told that
22 jury: There's one way in this country in which all men
23 are created equal, there is but one human institution
24 that makes a pauper the equal of a Rockefeller, the
25 stupid man the equal of an Einstein, and the ignorant

1 man the equal of any college president; and that
2 institution is the court and the jury.

3 I want to talk briefly about
4 circumstantial evidence. His Honor has mentioned it,
5 and my time is very, very short. I would like to talk
6 to you about what I think of as circumstantial evidence,
7 the footprints in the sand.

8 There's no question, wherever that
9 beautiful document is, that Bill got a patent. There's
10 no question, if you'll look at Alex Yost's testimony, at
11 119 that they've used Bill's patent and they profited by
12 it.

13 And let's go to the next slide of Bill
14 Chu. They offered his products for sale? Sure, we do.

15 Now, go to the next one.

16 20-percent margin. 20-percent margin.
17 Mid-30s margin.

18 Come on. And they didn't make a profit?
19 They want to stand up and ridicule -- and I hope you
20 never have to be a plaintiff in a case, because the
21 company will try you. I've seen this happen time and
22 time again.

23 Emmett Murtha, 35 years with IBM. And if
24 they were to have had one sliver -- with these bright,
25 bright folks at this table -- of information that had

1 been bad on Emmett Murtha, you'd better believe you
2 would have heard it.

3 The damage chart is clear and
4 unequivocal. The damages chart is clearly -- if you
5 just use 1 percent, \$27 million or \$26,999,000.66, and
6 I'd kick in the 4 cents myself -- 14 cents, whatever it
7 is -- 24 cents.

8 The eight of you have an opportunity --
9 you really do -- like you may never have again in your
10 life. You can right a wrong. When you go home today or
11 go back to work, assuming your deliberations are
12 completed, and someone asks you what you've been about,
13 you can tell them, if you wish, that you made IBM do
14 what's right, and you made them pay for the property
15 rights that they tore away from Bill Chu.

16 Frankly, we caught IBM with their hand in
17 the intellectual cookie jar. We really did. And all we
18 want them to do is to return the cookies that they took
19 out of the jar. We're not asking for any damages. We
20 want them to get off of Bill Chu's property, restore his
21 fence, and put him back like it was.

22 You know, theft of ideas is worse than
23 theft of one's purse or billfold. Man creates purses
24 and billfolds. God creates ideas.

25 My hero, John Fitzgerald Kennedy stated

1 that a man may die -- my hero at Baylor, as a young
2 lawyer, I was touched by him and I'll remember it until
3 the day I die -- but nations may rise and fall, but an
4 idea lives on. Ideas have endurance without death.

5 Ladies and Gentlemen, in closing, I want
6 to tell you that I fervently believe that this system
7 works. What is on trial here is far greater than just
8 property rights. It's whether or not you will allow IBM
9 to take the property of another that is not theirs to
10 take.

11 This is such an important issue. It's
12 not you; it's Bill Chu. But I will remind you of the
13 call of a gentleman named Martin Neumuller, who, in
14 Berlin in 1937, during the days that the Brown Shirts
15 were marching up and down the street and the call -- the
16 clarion call was clear, but Martin Neumuller later wrote
17 in a dramatic and sad cry.

18 As a Protestant clergyman from Berlin in
19 1937, as Hitler's Brown Shirts were going from house to
20 house taking people away when he said: In Germany, they
21 first came for the Communists, and I didn't speak up
22 because I was not a Communist. And then they came for
23 the Jews, and I didn't speak up, because I wasn't a Jew.

24 Then they came for the trade unionists,
25 but I didn't speak up, because I wasn't a trade

1 unionist. Then they came for the Catholics, but I
2 didn't speak up, because I was a Protestant. And then
3 they came for me, because I believed in the Lord Jesus
4 Christ. And by that time, there was no one left to hear
5 my screams.

6 We ask you to restore on the fences --
7 the fences on the field of justice and make IBM pay for
8 what they owe Bill Chu.

9 In closing, I want to leave you the words
10 of a Frenchman named Alec de Tocqueville, who was sent
11 over here by King Louis XIV to study the American system
12 here in the mid-1800s. What was so magical about it?
13 How did this system continue to exist? How did it work
14 so well, this democracy?

15 And he concluded that what made this
16 country work was the right of a trial by jury. In his
17 treatise, Professor Tocqueville stated: A pencil in the
18 hands of a foreperson of an American juror is more
19 powerful than all the armies that have ever marched and
20 all the navies that have ever sailed.

21 In closing, Ladies and Gentlemen, there
22 are certain things that I know. I know about the love
23 that I have for my family. I know about the care of
24 both sides of this table for their respective causes.

25 I know that rain falls down, and water

1 doesn't run uphill. I know that it doesn't snow in
2 Tyler in August. And I know IBM took Bill Chu's fence
3 down just as well as I know my name is George Edmond
4 Chandler, so help me God.

5 And that's the oath that you good folks
6 took when you agreed to be jurors. All we ask is you
7 follow the evidence and return a verdict, which in Latin
8 means the truth. Whatever it is, we'll live by it.

9 God bless you in your deliberations.

10 THE COURT: Thank you, Mr. Chandler.

11 All right. Ladies and Gentlemen of the
12 Jury, we started here a little over a week ago with jury
13 selection -- or two weeks ago actually with jury
14 selection and came back. You've heard the opening
15 instructions. You've heard all the evidence. You've
16 heard the Court's Charge. You've now heard all the
17 final arguments.

18 So it's time for you to go to work, and
19 it's your job to deliberate and reach a verdict. The --
20 you have been sort of at our mercy as far as schedule
21 and when we take breaks and that type of thing.

22 Everyone in this courtroom is now going
23 to be at your mercy. We will be waiting on you, and you
24 work at your schedule. Send notes if you -- if you have
25 anything that you need. I believe that lunch has been

1 provided for you.

2 Go into the jury room. I would suggest
3 the first thing you do is elect your foreperson, and
4 then decide as a group whether you'd like to just eat
5 lunch and kind of take a break and then discuss it, or
6 whether you'd like to go ahead and discuss it. And you
7 can do it however -- however you choose. You're in
8 charge now.

9 So with those instructions, I relieve you
10 of my instruction not to discuss the case among
11 yourselves. In fact, I instruct you to go discuss the
12 case among yourselves.

13 So with that and the Court's thanks for
14 your service, you are excused to the jury room.

15 COURT SECURITY OFFICER: All rise for the
16 jury.

17 (Jury out.)

18 THE COURT: Please be seated.

19 Anything else from either party before we
20 adjourn?

21 MR. VERHOEVEN: One housekeeping matter,
22 Your Honor. I don't know what Your Honor's preference
23 is, but in other cases before, some of these PowerPoint
24 slides that were used for demonstratives obviously are
25 not evidence, but for the record in cases in the past,

1 what I've suggested, and it's sometimes done, is just
2 log those so that they're in the record.

3 And, for example, if this case ends up
4 going on appeal or something, people will be able to see
5 what the questions -- follow along with the slides.

6 And I don't know if Your Honor has
7 addressed that before.

8 THE COURT: What's Plaintiff's position
9 with regard to that?

10 MR. FRIEL: We disagree on that. There
11 are hundreds of these slides in color. Some don't have
12 meaning, unless they're in color, and it would just
13 create much more work on appeal.

14 THE COURT: If there's not agreement,
15 then we'll just base it on -- the record on the evidence
16 before the Court. Thank you for the suggestion, though.

17 MR. VERHOEVEN: Thank you, Your Honor.

18 THE COURT: All right. Anything further
19 from either party?

20 All right. Good luck to both sides, and
21 I will be anxious to hear the jury's verdict.

22 COURT SECURITY OFFICER: All rise.

23 (Court adjourned.)

24 (Jury out.)

25 COURT SECURITY OFFICER: All right.

1 THE COURT: I understand we have an
2 objection regarding two exhibits; is that correct?

3 MS. CANDIDO: That is correct, Your
4 Honor.

5 THE COURT: All right. What's the
6 objection?

7 MS. CANDIDO: We're trying to figure out,
8 Your Honor, what's happened. Plaintiff is representing
9 to us that they were on the stipulated list at some
10 point.

11 We don't think that's correct. And we
12 have -- there was not a stipulation to the admission of
13 these exhibits.

14 THE COURT: I'm sorry?

15 MS. CANDIDO: We don't believe that we've
16 ever seen a list from Plaintiff suggesting these were
17 stipulated to, and we don't agree --

18 THE COURT: This is why we have a --
19 you're talking about Defendant's Exhibits 182 and 188;
20 is that correct?

21 MS. CANDIDO: That's correct, Your Honor.

22 THE COURT: That's why -- why I caution
23 y'all to review these lists and why I ask you each day
24 to stand up and say if you have any objections.

25 According to Plaintiff's Exhibit List No.

1 2, Defendant's Exhibit 182 and 188 were both offered and
2 admitted without objection.

3 MS. CANDIDO: I'm sorry, Your Honor. We
4 apparently have a clerical error with respect to
5 tracking these two exhibits in particular.

6 We have copies we can give to the Court,
7 but Defendants do have an objection to their admission,
8 especially DX188.

9 THE COURT: Well, the evidence has
10 closed. I'll let you make any kind of record you would
11 like to, but -- any type of objection you want to, go
12 ahead.

13 MS. CANDIDO: Well, our objection DX188
14 is there's been no -- there's been no witness that's
15 sponsored this agreement. It's not -- it wasn't relied
16 upon by any of the testifying witnesses. It's one off
17 of the IBM license agreement, and there's been no
18 other -- of those license agreements that have been in
19 evidence in this case with any of the witnesses.

20 THE COURT: Okay. Response?

21 MR. ARMON: Your Honor, Orion Armon for
22 the Plaintiff.

23 It's our sincere belief those two
24 exhibits were stipulated to and admitted into evidence.

25 So we can check our records to see if

1 we've got confirmation of that, but we believe they were
2 entered. And we'll have to go back and check to see.

3 THE COURT: Do you want to withdraw the
4 exhibits?

5 MR. ARMON: No, we don't.

6 THE COURT: All right. The objection is
7 overruled.

8 What's next?

9 MS. CANDIDO: I believe that's it, Your
10 Honor.

11 THE COURT: So you just object to 188?

12 MS. CANDIDO: Yes. 182 is just a cover
13 page. We have no objection to that.

14 THE COURT: All right. Very well.

15 Anything further?

16 MS. CANDIDO: No, Your Honor.

17 THE COURT: I was almost to the parking
18 lot.

19 MS. CANDIDO: Sorry.

20 COURT SECURITY OFFICER: All rise.

21 (Recess.)

22 (The Honorable John Love, United States
23 Magistrate Judge, presiding.)

24 (Jury out.)

25 THE COURT: Please be seated.

1 Well, I'm sure Judge Davis has explained
2 to you why I'm here, why you're not seeing him.

3 We do have a verdict -- I mean, not a
4 verdict -- a note -- excuse me -- from the jury. I
5 don't want to scare anyone. But the note is about as
6 innocuous as it can get.

7 It simply says: Can we please obtain
8 Post-It flags or small notes to mark pages and yellow
9 highlighters? To which I have responded yes, would be
10 my proposal. And we have them here.

11 Anyone -- anything else to add to that
12 very interesting note?

13 MR. SMITH: Nothing from the Plaintiff,
14 Your Honor.

15 THE COURT: Okay.

16 MR. STONE: Nothing from Defendant, Your
17 Honor.

18 THE COURT: All right. Thank you.

19 All right. Well, we will pass these
20 along to the jury and await further note or verdict.

21 All right. Well, thank you, and we'll be
22 adjourned, recessed, awaiting a note or a verdict.

23 Thank you.

24 MR. STONE: Thank you, Your Honor.

25 MR. SMITH: Thank you, Your Honor.

1 COURT SECURITY OFFICER: All rise.

2 (Jury deliberations continued.)

3 COURT SECURITY OFFICER: All rise.

4 THE COURT: Please be seated.

5 All right. We have another note from the
6 jury, and I believe y'all have seen what it says.

7 It says: Can we look at IBM's blade
8 server and chassis, please? And thank you, signed by
9 the Jury Foreperson.

10 Let me inquire, I don't know if the
11 parties have had a chance to discuss it. Let me talk
12 first to the Plaintiff, the Plaintiff's position on the
13 jury's note.

14 MR. SMITH: Our position is we would
15 prefer not to send it back, Your Honor. It was not in
16 evidence. It wasn't offered into evidence. And just
17 because the history of how the BladeCenter was brought
18 into this case, we don't believe that the specific
19 device should go back to the jury.

20 THE COURT: All right. Defendant,
21 response?

22 MR. STONE: Your Honor, we believe that
23 it is in evidence, DX1. So we can spend a minute
24 talking about that with Mr. Friel. But it's in
25 evidence; and if the jury is asking for it, then it

1 should be sent back.

2 MR. SMITH: We sent back the pieces that
3 were offered into evidence.

4 MR. PAUNOVICH: We discussed with Jim
5 Brogan and apparently before we took it back, it's in
6 evidence. It's on the stipulated list.

7 MR. SMITH: When was it offered into
8 evidence?

9 MR. PAUNOVICH: I don't know when it was,
10 but I wasn't here, but Jim --

11 THE COURT: We need to be sure of who's
12 talking here. We're getting kind of outside the box, so
13 be sure you state your name, if you need to.

14 Well, what does the list say? I mean, I
15 know y'all have been submitting lists as we go.

16 Well, on this list I'm looking at, there
17 is a DX1. It says it's blade server -- BladeCenter
18 system and components, Defendant's Exhibit List, Page 3.

19 Mr. Smith, have you seen this?

20 MR. SMITH: I haven't, Your Honor. If it
21 is on -- if it was admitted into evidence during the
22 trial, we don't have an objection to it. My
23 understanding was that it was not on the list.

24 THE COURT: Well, I'd like to get
25 agreement that it was admitted. I don't know what the

1 difficulty here is, agreeing or what the holdup is. I
2 mean, first of all, have we taken it back?

3 I believe the Court intended to submit
4 all the exhibits that were admitted into evidence to the
5 jury. If we haven't, we need to get that in there.

6 Where is it?

7 MR. PAUNOVICH: Just right here
8 (indicates).

9 MR. STONE: There's a box you can't see
10 behind the witness stand, Your Honor.

11 MR. SMITH: Was it admitted?

12 MR. STONE: Yes, it was, by stipulation.

13 MR. SMITH: Your Honor, in light of -- in
14 light of the representation, it is on the IBM's list of
15 exhibits admitted during trial. We don't have an
16 objection to it going back to the jury.

17 THE COURT: All right. Thank you.

18 Well, let me ask this: I mean, there's
19 agreement it will be submitted. As far as my response
20 to the jury, it can be just as simple as yes, and we
21 send it to the jury; or I could add something
22 additional, if either party would like me to.
23 Mr. Smith?

24 MR. SMITH: I think yes would be fine,
25 Your Honor.

1 MR. STONE: That's satisfactory to the
2 Defendant.

3 THE COURT: All right. Then that's the
4 way I'll respond then, which is a simple yes, and we
5 will submit that, Defense Exhibit 1, to the jury.

6 All right. Anything else from the
7 Plaintiff at this time?

8 MR. SMITH: Not from the Plaintiff, Your
9 Honor.

10 THE COURT: And the Defendant?

11 MR. STONE: Your Honor, just to clarify,
12 we're going to remove it from the box that it was
13 shipped in. It was out during the pendency of the
14 trial, and that's the way in which it was demonstrated
15 to the jury. And it's on a box with wheels, so we can
16 wheel it back, if that's okay.

17 THE COURT: Any objection?

18 MR. SMITH: No, Your Honor.

19 THE COURT: That sounds fine with me.

20 All right. We'll be in recess awaiting
21 another note or verdict. Thank you.

22 COURT SECURITY OFFICER: All rise.

23 (Recess.)

24 COURT SECURITY OFFICER: All rise.

25 THE COURT: Please be seated.

1 All right. We have another note from the
2 jury, and I believe y'all have seen what it says.

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20 talking about that with Mr. Friel. But it's in
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21 agreement that it was admitted. I don't know what the
22 difficulty here is, agreeing or what the holdup is. I
23 mean, first of all, have we taken it back?

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25 all the exhibits that were admitted into evidence to the

1 jury. If we haven't, we need to get that in there.

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6 behind the witness stand, Your Honor.

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10 light of the representation, it is on the IBM's list of
11 exhibits admitted during trial. We don't have an
12 objection to it going back to the jury.

13 THE COURT: All right. Thank you.

14 Well, let me ask this: I mean, there's
15 agreement it will be submitted. As far as my response
16 to the jury, it can be just as simple as yes, and we
17 send it to the jury; or I could add something
18 additional, if either party would like me to.

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20 MR. SMITH: I think yes would be fine,
21 Your Honor.

22 MR. STONE: That's satisfactory to the
23 Defendant.

24 THE COURT: All right. Then that's the
25 way I'll respond then, which is a simple yes, and we

1 will submit that, Defense Exhibit 1, to the jury.

2 All right. Anything else from the
3 Plaintiff at this time?

4 MR. SMITH: Not from the Plaintiff, Your
5 Honor.

6 THE COURT: And the Defendant?

7 MR. STONE: Your Honor, just to clarify,
8 we're going to remove it from the box that it was
9 shipped in. It was out during the pendency of the
10 trial, and that's the way in which it was demonstrated
11 to the jury. And it's on a box with wheels, so we can
12 wheel it back, if that's okay.

13 THE COURT: Any objection?

14 MR. SMITH: No, Your Honor.

15 THE COURT: That sounds fine with me.

16 All right. We'll be in recess awaiting
17 another note or verdict. Thank you.

18 COURT SECURITY OFFICER: All rise.

19 (Recess.)

20 (Jury out.)

21 COURT SECURITY OFFICER: All rise.

22 THE COURT: Please be seated.

23 All right. Well, we have Jury Note
24 No. 3, and the jury's note says: Can somebody bring us
25 our work excuses for the week? Thank you, Jury. And

1 another smiley face, signed by the Foreperson.

2 Anything -- my proposed response would
3 be: Yes, we will bring them to you. We have them here.

4 I believe Ms. Ferguson has them so we can
5 bring them to the jury right now.

6 Any objection or problems with that?
7 Plaintiff?

8 MR. FRIEL: None, Your Honor.

9 MR. STONE: None, Your Honor.

10 THE COURT: All right. Well, we'll
11 respond that way, and be awaiting something from the
12 jury.

13 Thank you.

14 COURT SECURITY OFFICER: All rise.

15 (Jury deliberations continued.)

16 (Jury out.)

17 COURT SECURITY OFFICER: All rise.

18 THE COURT: Please be seated.

19 All right. I have a note from the jury
20 that they have arrived at a verdict.

21 Anything to take up before we bring the
22 jury?

23 MR. FRIEL: Not from the Plaintiff, Your
24 Honor.

25 MR. VERHOEVEN: No, Your Honor.

1 THE COURT: All right. You may bring the
2 jury in.

3 COURT SECURITY OFFICER: All rise for the
4 jury.

5 (Jury in.)

6 THE COURT: Please be seated.

7 All right. Ladies and Gentlemen of the
8 Jury, I'm United States Magistrate Judge John Love. I
9 know Judge Davis has explained to you why he's unable to
10 finish this trial with you. I know he expressed his
11 regret in not being able to do so, but I'm here, and
12 I'll finish this trial with you.

13 Now, let me ask, is Mr. Griffith the
14 Foreperson?

15 Mr. Griffith, has the jury arrived at a
16 verdict?

17 THE FOREMAN: Yes, sir.

18 THE COURT: If you'll hand it to the
19 Court Security Officer, who will hand it to
20 Ms. Ferguson, who will hand it to me to review.

21 (Pause.)

22 All right. Ms. Ferguson will now read
23 the verdict of the jury.

24 COURTROOM DEPUTY: In Case
25 No. 6:09-cv-148, ACQIS LLC versus IBM, Verdict Form.

1 As to Question No. 1: Did ACQIS prove by
2 a preponderance evidence that IBM infringed any of the
3 asserted claims of the ACQIS patents identified below?

4 The answer as to the '415 patent on both
5 claims is: Yes.

6 The answers to the '416 patent, single
7 claim, is: Yes.

8 The answer to the '779 patent, all three
9 claims: Yes.

10 Question No. 2: For each asserted claim
11 of the patents-in-suit, did IBM prove by clear and
12 convincing evidence that such claim is invalid?

13 Answer as to the '415 patent for both
14 claims is: No, under anticipation; and, no, under
15 obviousness.

16 As to the '416 patent, the answer is, no,
17 as to anticipation and obviousness.

18 As to the '779 patent, the answer is, no,
19 as to anticipation and obviousness on all three claims.

20 Answer (sic) No. 3: What sum of money
21 now -- if now paid in cash, do you find from a
22 preponderance -- preponderance of the evidence would
23 fairly and reasonably compensate ACQIS?

24 And I'm not going to read the rest of
25 that question, but the answer is nine million

1 ninety-four thousand -- ninety four, one forty eight.

2 Dated and signed by the Jury Foreperson.

3 THE COURT: All right. Thank you.

4 Is there a request to poll the jury from
5 either side?

6 MR. SMITH: Not from the Plaintiffs, Your
7 Honor.

8 MR. VERHOEVEN: Not from the Defendant,
9 Your Honor.

10 THE COURT: Well, Ladies and Gentlemen, I
11 want to thank you very much for your service. I know
12 Judge Davis thanks you as well. I would tell you that
13 you're about to be dismissed, and no one from either
14 side should contact you about this case.

15 If anyone does contact you, I would ask
16 that you contact Judge Davis's Chambers immediately.

17 Now, as I say, you're about to be
18 excused. What I would ask you to do is go to the jury
19 room and wait there. Someone will be there shortly to
20 excuse you. I, again, thank you very much for your
21 service, for your hard work. And as I say again, Judge
22 Davis does, as well.

23 So you are excused to the jury room.

24 Please wait there until someone arrives to excuse you.

25 COURT SECURITY OFFICER: All rise for the

1 jury.

2 (Jury out.)

3 THE COURT: Please be seated.

4 All right. Anything to take up from the
5 Plaintiff before we adjourn?

6 MR. FRIEL: Not from the Plaintiff, Your
7 Honor.

8 THE COURT: Anything from the Defendant?

9 MR. VERHOEVEN: No, Your Honor.

10 THE COURT: Thank you. We're adjourned.

11 COURT SECURITY OFFICER: All rise.

12 (Court adjourned.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of our abilities.

/s/_____

SHEA SLOAN, CSR

Date

Official Court Reporter

State of Texas No.: 3081

Expiration Date: 12/31/12

/s/_____

JUDITH WERLINGER, CSR

Date

Deputy Official Court Reporter

State of Texas No.: 731

Expiration Date 12/31/12